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APPELLANT'S BRIEF

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

MIDDLESEX COUNTY

NO. 2014-P-1576

COMMONWEALTH

V.

KENNETH DYKENS

DEFENDANT'S BRIEF AND RECORD APPENDIX ON APPEAL FROM
THE DENIAL OF HIS POST-CONVICTION MOTION FOR RELIEF IN
THE MIDDLESEX DIVISION OF THE SUPERIOR COURT
DEPARTMENT

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ISSUES PRESENTED

- I. Did the Legislature authorize issuance of multiple indictments under G. L. c. 274, § 6 for the attempted unarmed burglary of a single dwelling, where the would-be burglar undertook several overt acts during a continuous course of conduct.
- II. Did the Legislature authorize issuance of an indictment under G. L. c. 266, § 49 for possession of burglarious tools, to wit a rock.

STATEMENT OF THE CASE

On March 31, 2005, a Middlesex County grand jury returned a seventeen count indictment against the defendant, Kenneth Dykens, alleging attempt to commit unarmed burglary (001, 003 and 005), assault with intent to maim (007), assault and battery by means of a dangerous weapon (009), possession of burglarious instruments (011), malicious destruction of property over \$250 (013), assault and battery on a police officer (015 and 016), and resisting arrest (017). (R. 5, 13). Indictments 002, 004, 006, 008, 010, 012,

and 014 did not allege free-standing crimes; each alleged a sentencing enhancement under the habitual criminal offender statute, G. L. c. 279, § 25. (R. 13).

On June 2, 2005, Mr. Dykens moved to dismiss two of the three charges of attempted breaking and entering (003 and 005), on the ground that they were duplicative; he further moved to dismiss the charge of assault and battery with a dangerous weapon (009) and malicious destruction of property (013), on the ground that the grand jury did not hear sufficient evidence to establish probable cause to indict him on those charges. (R. 6, 73-80). Judge Peter M. Lauriat denied his motion on indictments 003, 005, and 009, but granted his motion on indictment 013. (R. 6, 31-36).

On October 17, 2005, Mr. Dykens pleaded guilty to the remaining substantive charges and the Commonwealth nol prossed habitual offender indictments 004, 006, 008, 010, 012. (R. 6-7). Judge Lauriat sentenced Mr. Dykens as follows: on indictment 007, seven years to seven years one day, committed, state prison; on indictment 001, five years, committed, state prison,

concurrent with 007; on indictment 003, five years, probation, from and after the committed sentence on 007; on indictments 005, 009, 011, 015, 016, 017, five years, probation, concurrent with 003, from and after 007. (R. 7).

On March 22, 2013, Judge Lauriat held a final probation surrender hearing. (R. 12). He found Mr. Dykens violated his probation and sentenced him as follows: on indictment 009, two years, committed, house of correction; and on indictment 011, two years, committed, house of correction, from and after 009. (R. 12, 93). Judge Lauriat terminated Mr. Dykens' probation on the remaining convictions. (R. 12-13, 93).

On October 11, 2013, Mr. Dykens filed a Mass. R. Crim. P. 30(a) motion to vacate his convictions on indictments 003, 005, and 011. (R. 13, 14-17, 18-43). On August 18, 2014, the Commonwealth filed its opposition to that motion. (R. 13, 44-94). On September 2, 2014, Judge Lauriat denied the motion. (R. 13, 95). On September 24, 2014, Mr. Dykens timely filed his notice of appeal and the case entered in this Court on October 15, 2014. (R. 96).

STATEMENT OF FACTS

In his decision on Mr. Dykens' motion to dismiss, Judge Lauriat set forth the facts presented to the grand jury:

On March 29, 2005, a grand jury sitting in Cambridge heard testimony from Officer Brian Killion and Officer Robert Selfridge alleging the following facts. On February 10, 2005 at approximately 2:30 a.m., the Malden police received a call for assistance from 124 Granite Street in Malden, the residence of John and Jacqui Cram. The Crams told officers that they were asleep on the second floor when John Cram ("John") was awoken by a loud noise from downstairs. John went downstairs to investigate. When he entered the kitchen, he saw that one of the glass doors leading from the kitchen to a deck had been broken, and there was a large rock amidst the broken glass on the floor. When he approached the door he also noticed that a ladder he kept at the side of the house had been moved to the deck and was partially propped up against the house. John then saw the shadow of a person running across the back yard. Police later found a screen on the ground outside the house that had been on the first-floor window just above the cellar door. It appeared to police that someone had stood on the ledge over the cellar door and attempted to gain entry through that window.

When the police arrived, they followed footprints in the snow leading to a wooded area nearby. There they found Dykens. When the officers tried to arrest him, Dykens struggled, striking out at the officers, gouging Officer Killion's eye with his finger, and kicking Officer Killion in the face with his shod foot. (R. 32-33).

At the plea colloquy, the prosecutor recounted the same facts. (R. 37-42).

ARGUMENT

I.

The Legislature did not authorize issuance of multiple indictments under G. L. c. 274, § 6 for the attempted burglary of a single house, regardless of how many overt acts the would-be burglar undertook during a continuous course of conduct.

"Under the double jeopardy clause of the Fifth Amendment to the United States Constitution and Massachusetts common law, no person may be convicted twice for the same offense." *Commonwealth v. Horne*, 466 Mass. 440, 449 (2013). Where, as here, a defendant is convicted multiple times under the same statute, the court must "examine the statute and ask what 'unit of prosecution' was intended by the Legislature as the punishable act." *Id.* at 449-450, quoting *Commonwealth v. Rabb*, 431 Mass. 123, 128 (2000). "This inquiry is informed by the language and purpose of the statute, as well as the rule of lenity, which requires us to resolve any ambiguities in the defendant's favor." *Commonwealth v. Bolden*, 470 Mass. 274, 277 (2014), citing *Horne*, 466 Mass. at 450.

The elements of criminal attempt, G. L. c. 274, § 6, are (1) specific intent, (2) an overt act, and (3) non-achievement of the substantive crime.

Commonwealth v. Bell, 455 Mass. 408, 412 (2009).

Here, Mr. Dykens was convicted of three counts of attempted burglary, each based on a different "overt act" he took while attempting to enter a Malden house one night in February 2005: (001) threw rock through sliding glass door; (003) propped ladder against house; and (005) removed screen from first floor window. Trial counsel moved before the plea agreement to dismiss indictments 003 and 005 as duplicative of indictment 001. (R. 6, 73-80). The trial court denied the motion:

In this case, General Laws c. 274, § 6 is clear. It prohibits the "attempt to commit a crime by doing any act toward its commission that fails in its perpetration...." If the legislature intended for a single attempt charge to cover all overt acts directed toward the commission of a single crime, it would have used the words "any act or acts," rather than "any act." It is a fundamental principle of statutory construction that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result. [Citations and quotation marks omitted]. Consequently, Indictments 003 ... [and] 005 must stand. (R. 33-34).

To the contrary, those convictions cannot stand. First, such an analysis ignores the Legislature's own "Rules for construction of statutes," embodied in G. L. c. 4, § 6, Fourth: "Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter." Thus, "any act" in the criminal attempt statute actually means "any act or acts." From this alternatively singular or plural meaning, it should be inferred that "the legislature intended for a single attempt charge to cover all overt acts directed toward the commission of a single crime." See *Commonwealth v. Botev*, 79 Mass. App. Ct. 281, 286 (2011) ("The appropriate inquiry in a case like this asks what 'unit of prosecution' was intended by the Legislature as the punishable act."). At the very least, the construction of "any act" as "any act or acts" creates an ambiguity in the attempt statute, which should be resolved, under the rule of lenity, in favor of Mr. Dykens. See *id.*

Also "[r]elevant to discerning a criminal statute's unit of prosecution is the continuous offense doctrine, which recognizes that certain criminal statutes are intended to punish just once for a continuing course of conduct, rather than for each and every discrete act comprising that course of conduct." *Horne*, 466 Mass. at 450. Here, Mr. Dykens' overt acts "were part of a continuous stream of conduct occurring within a short time frame and governed by a single criminal design"; it was therefore error to divide the conduct into three "discrete units for prosecution." (R. 32-33, 38-39). *Commonwealth v. Howze*, 58 Mass. App. Ct. 147, 153 (2003) (offenses duplicative based on "unity of time, place, and intent"). Otherwise criminal attempt would be coextensive with one of its elements, so that every overt act constituted a separate attempt. See *United States v. Resendiz-Ponce*, 549 U.S. 102, n.5 (2007) (unrealistic to treat every overt act as a separate criminal attempt; such an approach "would perversely enhanc[e], rather than avoid[], the risk of successive prosecution for the same wrong."). And, depending on the number of overt acts, a defendant could end up

being punished more severely for attempting to commit a substantive offense than if he had actually committed the substantive offense. The Legislature could not have intended that result. See *Botev*, 79 Mass. App. Ct. at 288-89 (convictions duplicative where contrary finding could produce absurd and unreasonable results).

Similarly, it is relevant that the substantive crime that Mr. Dykens attempted to commit was unarmed burglary, which is a crime against property. G. L. c. 266, § 15. Recently, in *Bolden*, 470 Mass. at 279, the Supreme Judicial Court found:

Our review of the common law suggests that multiple breaks of a single dwelling did not create distinct, punishable burglaries, but were in law but one transaction. Finding no intent by the Legislature to depart from this precept, we conclude that once a dwelling is "broken," any subsequent breaks occurring therein – reasonably close in time and purpose – are but a continuation of the offense and thus insufficient to support separate convictions under § 14. [internal citations, parentheticals, and quotation marks omitted].

It therefore stands to reason that multiple attempted breaks of a single dwelling do not create distinct, punishable crimes where the subsequent

"attempts" – reasonably close in time and purpose – are but a continuation of the offense. See *id.*

For these reasons, the three attempt convictions here were duplicative. This court should therefore vacate the convictions on indictments 003 and 005 and dismiss those indictments. See *Commonwealth v. Negron*, 462 Mass. 102, 105, 108 (2012) (Mass. R. Crim. P. 30(a) motion proper vehicle to challenge duplicative convictions, even where the defendant pleaded guilty to the duplicative indictments and "even where the punishment is concurrent.").

II.

The Legislature did not authorize issuance of an indictment under G. L. c. 266, § 49 for possession of burglarious tools, to wit a rock.

After unsuccessfully attempting to break into a house by other means, Mr. Dykens picked up a rock and threw it through the house's sliding glass door. (R. 14-17, 32, 38-39). Based on this act, Mr. Dykens was convicted of, *inter alia*, possessing a burglarious tool under G. L. c. 266, § 49. A rock, however, is simply not a tool for purposes of that statute. "The primary source of insight into the intent of the

Legislature is the language of the statute."

Commonwealth v. Rahim, 441 Mass. 273, 274 (2004).

G. L. c. 266, § 49 states:

"Whoever makes or mends, or begins to make or mend, or knowingly has in his possession, an engine, machine, tool or implement adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe or other depository, in order to steal therefrom money or other property, or to commit any other crime, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ or allow the same to be used or employed for such purpose ... shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years."

St. 1966, c. 269, § 1.

Because the Legislature did not define "tool," that word must be given its ordinary meaning as of 1853, the year the statute was enacted. St.1853, c. 194. See *Kerins v. Lima*, 425 Mass. 108, 112, n.5 (1997) (definition "that would have been available to the Legislature at the time that the original statute was enacted" was the definition "intended by the Legislature"). The 1850 edition of Webster's Dictionary defined "tool": "An instrument of manual operation, particularly such as are used by farmers

and mechanics; as the *tools* of a joiner, cabinet maker, smith or shoemaker." An American Dictionary of the English Language 1160 (1850) (*italics in original*). In turn, that same edition of Webster's defined "instrument": "A tool; that by which work is performed, or any thing effected; as a knife, a hammer, a saw, a plow, &c. Swords, muskets, and cannon, are *instruments* of destruction. A telescope is an astronomical *instrument*." *Id.* at 612 (*italics in original*). Based on these definitions, it is clear that a rock, in and of itself, would not have been considered a tool in 1853.¹

That the Legislature did not intend for G. L. c. 266, § 49 to cover the possession of a rock is further supported by other language in the statute. Indeed, in addition to punishing anyone who possesses burglarious tools, G. L. c. 266, § 49 punishes anyone who "**makes or mends**" burglarious tools. This language

¹ Nor would a rock have been considered an implement in 1853 for purposes of the burglarious tools statute. The 1850 edition of Webster's Dictionary defined "implement": "Whatever may supply wants; particularly applied to tools, utensils, vessels, instruments; the tools or instruments of labor; the vessels used in a kitchen, &c; as, the *implements* of trade or of husbandry. [*It is a word of very extensive signification.*] An American Dictionary of the English Language 583 (1850) (*italics in original*).

therefore strongly suggests that G. L. c. 266, § 49 requires possession of a **man-made** tool. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123-24 (1989) (the specific statutory language at issue should be "read in the total context of all the provisions" of the statute). That the tool must be "adapted and designed" (for breaking) further supports that conclusion. *Id.* See *Commonwealth v. Morse*, 2 Mass. 128, 132 (1806) (Parsons, C.J.) ("The words 'devised, adapted, and designed,' relate to the form or the nature of the materials. They have no reference to the person having them in his possession, or to his intention.").

Similarly, other principles of statutory construction strongly suggest that G. L. c. 266, § 49 requires possession of a man-made tool. Under the principle of *ejusdem generis*, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Commonwealth v. Hamilton*, 459 Mass. 422, n.12 (2011), quoting 2A N.J. Singer, *Sutherland Statutory Construction* § 47:17, at 358-360

(7th ed. 2007). Under the principle of *noscitur a sociis*, which is "a broader formulation of the *eiusdem generis* principle," "a word gains meaning from others with which it is associated." *Commonwealth v. Gallant*, 453 Mass. 535, 542 (2009), quoting H.J. Alperin & L.D. Shubow, *Summary of Basic Law* § 19.10, at 846 (3d ed. 1996). Thus, according to these principles, the Legislature's placement of "tool" in a list following necessarily man-made items – "engine" and "machine" – suggests that the Legislature intended G. L. c. 266, § 49 to criminalize only the possession of man-made tools.

In any event, because the language of § 49 is, at the very least, ambiguous as to whether it criminalizes possession of a natural material unmodified by man (that could conceivably be used for breaking), it must be "construed narrowly," *Commonwealth v. Kerr*, 409 Mass. 284, 286 (1991), and "strictly against the Commonwealth." *Commonwealth v. Wotan*, 422 Mass. 740, 742 (1996). Indeed, this court "must resolve in favor of criminal defendants any reasonable doubt as to [a] statute's meaning." *Commonwealth v. Connolly*, 394 Mass. 169, 174 (1985)

(rule of lenity). This is because "the citizen is entitled to fair notice of what sort of conduct may give rise to punishment." *McNally v. United States*, 483 U.S. 350, 375 (1987) (Stevens, J., dissenting). The crime of possession of burglarious tools does not provide fair notice that possession of a rock may give rise to punishment.

Moreover, while there is no Massachusetts case on point, the earliest case interpreting St. 1853, c. 194, the predecessor to G. L. c. 266, § 49, implicitly supports the conclusion that the statute requires possession of a man-made tool. See *Commonwealth v. Tivnon*, 74 Mass. 375, 381 (1857) ("A chisel or centre-bit, though a tool in common use for ordinary purposes, is quite as efficacious in the hands of a burglar to carry out his felonious intent, as a jimmy or a lock-picker, which is made for the sole purpose of being used to break and enter buildings.").

Finally, a trio of cases from Oregon supports the conclusion that a rock is not a tool for purposes of G. L. c. 249, § 66. First, in *State v. Reid*, 36 Or. App. 417, 424 (1978), the Oregon Court of Appeals held that a beer bottle used to break a jewelry store

window was not a burglar's tool under the Oregon statute, which similarly to G. L. c. 266, § 49, defined a burglar's tool as "any tool, instrument, or other article adapted, designed or commonly used for committing or facilitating a forcible entry." *Id.* at 424. The court found that neither a beer bottle nor a piece of concrete was reasonably adapted to forcible entry and that their use for that purpose did not change their character. *Id.* at 428 (burglar's tools are defined in terms of their character and not necessarily their use). Second, in *State v. O' Keefe*, 40 Or. App. 685, 695 (1979), the Appeals Court held that neither a rock nor a brick was a burglar's tool. Third, in *State v. Warner*, 298 Or. 640, 645-650 (1985), the Oregon Supreme Court held that a metal signpost used to break into a barn was not a burglar's tool.

For all of these reasons, there is no crime of possession of burglarious tools, to wit a rock, even where the rock is used to forcibly enter a house. "A conviction on an indictment that charges no crime would be sheer denial of due process." *Commonwealth v. Wilson*, 72 Mass. App. Ct. 416, 418 (2008), quoting

Commonwealth v. Palladino, 358 Mass. 28, 31 (1970). Because “[n]o court has jurisdiction to sentence a defendant for that which is not a crime,” *Wilson*, 72 Mass. App. Ct. at 418, quoting *Commonwealth v. Andler*, 247 Mass. 580, 582 (1924), a jurisdictional defect may be raised at any time and is not waived by a defendant’s guilty plea. *Commonwealth v. Clark*, 379 Mass. 623, 626 (1980). Mr. Dykens therefore properly challenged his conviction on indictment 011 by moving, under Mass. R. Crim. P. 30(a), to vacate it. *Wilson* at 417–418. See also *Commonwealth v. Buckley*, 76 Mass. App. Ct. 123, 124 (2010).

CONCLUSION

For the reasons stated in Argument I, this court should reverse the trial court’s denial of Mr. Dykens’ motion to vacate the convictions on indictments 003 and 005, and remand to the trial court for dismissal of those indictments.

For the reasons stated in Argument II, this court should reverse the trial court’s denial of Mr. Dykens’ motion to vacate the conviction on indictment 011, and

remand to the trial court for dismissal of that
indictment.

Respectfully submitted,
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STATUTORY ADDENDUM

G. L. c. 4, § 6

Massachusetts General Laws Annotated

Part I. Administration Of The Government (Ch. 1-5)

Title I. Jurisdiction And Emblems Of The Commonwealth, The General Court, Statutes And Public Documents

Chapter 4. Statutes

§ 6. Rules for construction of statutes

Section 6. In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

First, The repeal of a statute shall not revive any previous statute, except in case of the repeal of a statute, after it has become law, by vote of the people upon its submission by referendum petition.

Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter.

Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.

Sixth, Wherever any writing is required to be sworn to or acknowledged, such oath or acknowledgment shall be taken before a justice of the peace or notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight.

Seventh, Wherever action by more than a majority of a city council is required, action by the designated proportion of the members of each branch thereof, present and voting thereon, in a city in which the city council consists of two branches, or action by the designated proportion of the members thereof, present and voting thereon, in a city having a single legislative board, shall be a compliance with such requirement.

Eighth, Wherever publication is required in a newspaper published in a city or town, it shall be sufficient, when there is no newspaper published therein, if the publication is made in a newspaper with general circulation in such city or town. If a newspaper is not published in such city or town and there is no newspaper with general circulation in such city or town, it shall be sufficient if the publication is made in a newspaper published in the county where such city or town is situated. A newspaper which by its title page purports to be printed or published in such city, town or county, and which has a circulation therein, shall be deemed to have been published therein.

Ninth, Wherever a penalty or forfeiture is provided for a violation of law, it shall be for each such violation.

Tenth, Words purporting to give three or more public officers or other persons authority to adopt, amend or repeal rules and regulations for the regulation, government, management, control or administration of the affairs of a public or other body, board, commission or agency shall not be construed as authorizing the adoption of a rule or regulation relative to a quorum which would conflict with the provisions of clause Fifth in the absence of express and specific mention therein to that effect.

Eleventh, The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.

G. L. c. 266, § 15

Massachusetts General Laws Annotated

Part IV. Crimes, Punishments And Proceedings In Criminal Cases (Ch. 263-280)

Title I. Crimes And Punishments

Chapter 266. Crimes Against Property

§ 15. Burglary; unarmed

Section 15. Whoever breaks and enters a dwelling house in the night time, with the intent mentioned in the preceding section, or, having entered with such intent, breaks such dwelling house in the night time, the offender not being armed, nor arming himself in such house, with a dangerous weapon, nor making an assault upon a person lawfully therein, shall be punished by imprisonment in the state prison for not more than twenty years and, if he shall have been previously convicted of any crime named in this or the preceding section, for not less than five years.

G. L. c. 266, § 49

Massachusetts General Laws Annotated

Part IV. Crimes, Punishments And Proceedings In Criminal Cases (Ch. 263-280)

Title I. Crimes And Punishments

Chapter 266. Crimes Against Property

§ 49. Burglarious instruments; making; possession; use

Section 49. Whoever makes or mends, or begins to make or mend, or knowingly has in his possession, an engine, machine, tool or implement adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe or other depository, in order to steal therefrom money or other property, or to commit any other crime, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ or allow the same to be used or employed for such purpose, or whoever knowingly has in his possession a master key designed to fit more than one motor vehicle, with intent to use or employ the same to steal a motor vehicle or other property therefrom, shall be punished by imprisonment in the state prison for not more than ten years or by a fine

of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

G. L. c. 274, § 6

Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

Title I. Crimes and Punishments

Chapter 274. Felonies, Accessories and Attempts to Commit Crimes

§ 6. Attempts to commit crimes; punishment

Section 6. Whoever attempts to commit a crime by doing any act toward its commission, but fails in its perpetration, or is intercepted or prevented in its perpetration, shall, except as otherwise provided, be punished as follows: First, by imprisonment in the state prison for not more than ten years, if he attempts to commit a crime punishable with death.

Second, by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, if he attempts to commit a crime, except any larceny under section thirty of chapter two hundred and sixty-six, punishable by imprisonment in the state prison for life or for five years or more.

Third, by imprisonment in a jail or house of correction for not more than one year or by a fine of not more than three hundred dollars, if he attempts to commit a crime, except any larceny under said section thirty, punishable by imprisonment in the state prison for less than five years or by imprisonment in a jail or house of correction or by a fine.

Fourth, by imprisonment in a jail or house of correction for not more than two and one half years or by a fine, or by both such fine and imprisonment, if he attempts to commit any larceny punishable under said section thirty.

G. L. c. 279, § 25

Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

Title II. Proceedings in Criminal Cases

Chapter 279. Judgment and Execution

§ 25. Punishment of habitual criminals

Section 25. (a) Whoever is convicted of a felony and has been previously twice convicted and sentenced to state prison or state correctional facility or a federal corrections facility for a term not less than 3 years by the commonwealth, another state or the United States, and who does not show that the person has been pardoned for either crime on the ground that the person was innocent, shall be considered a habitual criminal and shall be punished by imprisonment in state prison or state correctional facility for such felony for the maximum term provided by law.

(b) Whoever: (i) has been convicted 2 times previously of 1 or more of the following offenses: section 1, section 13, section 13^{1/2}, clause (i) of subsection (b) of section 13A, section 13B, subsection (a) of section 13B^{1/2}, section 13B^{3/4}, section 13F, committing an assault and battery upon a child and by such assault and battery causing bodily injury or substantial bodily injury under subsection (b) of section 13J, section 14, section 15, clause (i) of subsection (c) of section 15A, section 16, sections 17 and 18 if armed with a firearm, shotgun, rifle, machine gun, or assault weapon, section 18A, section 18B, section 18C, section 21, section 22, section 22A, section 22B, section 22C, section 23A, section 23B, section 24, section 24B, section 26, section 26B, section 26C, section 28, and subsection (b) of section 39 of chapter 265, section 14 or section 102C of chapter 266, section 4A, section 17, subsection (b) of section 29A, subsection (b) of section 29B, section 29C, section 35A and subsection (b) of section 53A of chapter 272, or has been convicted 2 times previously of a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority, arising out of charges separately brought and tried, and arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction; (ii) has been sentenced to incarceration at a state prison or state correctional facility or federal correction facility for at least 3 years to be served for each of the prior 2 convictions; and (iii) does not show that he has been pardoned for either prior offense on the ground that he was innocent shall, upon conviction

of 1 of the enumerated offenses in clause (i), where the offense occurred subsequent to the second conviction, shall be considered a habitual offender and shall be imprisoned in the state prison or state correctional facility for the maximum term provided by law for the offense enumerated in clause (i). No sentence imposed under this subsection shall be reduced or suspended nor shall such person so sentenced be eligible for probation, parole, work release or furlough or receive any deduction from such person's sentence for good conduct. A sentence imposed on a habitual offender under this subsection, if such habitual offender is incarcerated at a state prison or state correctional facility, shall commence upon the conclusion of the sentence such habitual offender is serving at the time of sentencing.

(c) No person shall be considered a habitual offender under subsection (b) based upon any offense for which such person was adjudicated a youthful offender, a delinquent child, or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority for which a person was treated as a juvenile.

(d) Upon sentencing a defendant to a qualifying term of incarceration, or prior to accepting a guilty plea for any qualifying offense listed in subsection (b), the court shall inform the defendant that a conviction or plea of guilty for such an offense implicates the habitual offender statute and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct. No otherwise valid plea or conviction shall be vacated based upon the failure to give such warnings.

RECORD APPENDIX

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Docket Entries	R. 1
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**Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Criminal Docket**

Commonwealth v Dykens, Kenneth

Details for Docket: MICR2005-00393

Case Information

Docket Number:	MICR2005-00393	Caption:	Commonwealth v Dykens, Kenneth
Entry Date:	03/31/2005	Case Status:	Crim 2 Ct Rm 530
Status Date:	10/20/2014	Session:	Disposed: Entered in Appeals Court
Lead Case:	NA	Deadline Status:	Active since
Trial Deadline:	06/15/2005	Jury Trial:	NO

Parties Involved

2 Parties Involved in Docket: MICR2005-00393

Party Involved:		Role:	Defendant
Last Name:	Dyken	First Name:	Kenneth
Address:	93 King George Dr	Address:	
City:	Boxford	State:	MA
Zip Code:		Zip Ext:	
Telephone:			

Party Involved:		Role:	Plaintiff
Last Name:	Commonwealth	First Name:	
Address:		Address:	
City:		State:	
Zip Code:		Zip Ext:	
Telephone:			

Attorneys Involved

9 Attorneys Involved for Docket: MICR2005-00393

R.1

**Attorney
Involved:**

Last Name: Wester
Address: 69-71 Main Street
City: Hudson
Zip Code: 01749
Telephone: 978-562-1885
Fascimile: 978-568-1441

Firm Name:

First Name: Mark
Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Dykens, Kenneth (Defendant)

**Attorney
Involved:**

Last Name: White Speight
Address: 15 Commonwealth Ave
City: Woburn
Zip Code: 01801
Telephone: 781-897-8900
Fascimile: 781-897-8901

Firm Name: MIDD02
First Name: Hallie
Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Commonwealth, (Plaintiff)

**Attorney
Involved:**

Last Name: Pogue
Address: 15 Commonwealth Ave
City: Woburn
Zip Code: 01801
Telephone: 781-897-8900
Fascimile: 781-897-8901

Firm Name: MIDD02
First Name: Anne C
Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Commonwealth, (Plaintiff)

**Attorney
Involved:**

Last Name: Solet
Address: 15 Commonwealth Ave
City: Woburn
Zip Code: 01801
Telephone: 781-897-8300
Fascimile: 781-897-8901

Firm Name: MIDD02
First Name: David Marc
Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Commonwealth, (Plaintiff)

**Attorney
Involved:**

Last Name: Heartquist

Firm Name:
First Name: Richard P

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City: Newburyport
Zip Code: 01950
Telephone: 978-687-6664
Fascimile: 978-687-1115

**Attorney
Involved:**

Last Name: Delaney
Address: 228 Central Street
City: Lowell
Zip Code: 01852
Telephone: 978-454-8103
Fascimile: 978-937-9422

**Attorney
Involved:**

Last Name: Kovner
Address: P.O. Box 831
City: Shirley
Zip Code: 01464
Telephone: 978-425-6201
Fascimile:

**Attorney
Involved:**

Last Name: Brown
Address: 15 Commonwealth Ave
City: Woburn
Zip Code: 01801
Telephone: 781-897-8900
Fascimile: 781-897-8901

**Attorney
Involved:**

Last Name: St. Lawrence
Address: 11 South Angell Street
City: Providence
Zip Code: 02906
Telephone: 508-431-3005

Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Dykens, Kenneth (Defendant)

Firm Name: RAPP06

First Name: Sean T

Address:
State: MA

Zip Ext:
Tel Ext:
Representing: Dykens, Kenneth (Defendant)

Firm Name:

First Name: Marcia T

Address:
State: MA
Zip Ext: 0831
Tel Ext:
Representing: Dykens, Kenneth (Defendant)

Firm Name: MIDD02

First Name: Allison

Address:
State: MA
Zip Ext:
Tel Ext:
Representing: Commonwealth, (Plaintiff)

Firm Name:

First Name: Timothy

Address: #252
State: RI
Zip Ext:
Tel Ext:

Calendar Events

33 Calendar Events for Docket: MICR2005-00393

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	04/20/2005	09:00	Arraignment	1	Event held as scheduled
2	05/17/2005	14:00	Bail: Review	5	Event not held--joint request
3	06/08/2005	14:00	Bail: 58A Review	5	Event held as scheduled
4	06/29/2005	14:00	Hearing: Evidentiary-dismiss	5	Event not held--joint request
5	07/20/2005	14:00	Hearing: Evidentiary-dismiss	5	Event held--(ACTIVE) under advisement
6	08/17/2005	14:00	Hearing: Non-eviden-Discovery	5	Event held as scheduled
7	09/07/2005	08:30	Status: Filing deadline	5	Event held as scheduled
8	09/14/2005	08:30	Hearing: Evidentiary-suppression	5	Event canceled not re-scheduled
9	10/17/2005	08:30	Hearing: Plea Change	5	Event held as scheduled
10	10/31/2005	08:30	TRIAL: by jury	5	Event canceled not re-scheduled
11	11/30/2005	14:00	Hearing: Motion	5	Event canceled not re-scheduled
12	01/05/2006	14:00	Hearing: Motion	5	Commonwealth did not appear
13	02/03/2006	09:00	Hearing: Motion	5	Event not held--req of Defendant
14	03/13/2006	14:00	Hearing: Motion	5	Event not held--joint request
15	04/11/2006	14:00	Hearing: Motion	5	Event held as scheduled
16	05/09/2006	14:00	Status: Administrative Review	5	Event held as scheduled
17	12/12/2007	14:00	Hearing: Sentence Revise/Revoke	5	Event not held--req of Defendant
18	01/29/2008	15:00	Hearing: Sentence Revise/Revoke	5	Event held as scheduled
19	06/07/2012	09:00	Hearing: Appointment Counsel	CM	Defendant did not appear/default
20	06/07/2012	09:00	Hearing: Warrant Removal	CM	Event held as scheduled
21	06/19/2012	14:00	Hearing: Probation Surrender	2	Event held as scheduled
22	07/23/2012	08:30	Hearing: Capias	CM	Event held as scheduled
23	08/14/2012	09:00	Hearing: Appointment Counsel	CM	Event not reached by Court
24	08/16/2012	09:00	Hearing: Appointment Counsel	CM	Event not reached by Court
25	08/23/2012	09:00	Hearing: Appointment Counsel	CM	Event held as scheduled
26	10/25/2012	14:00	Hearing: Probation Surrender	2	Event not reached by Court
27	11/29/2012	14:00	Hearing: Probation Surrender	2	Event rescheduled by court prior to date
28	01/24/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event not held--req of Probation
29	01/25/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event not held--req of Probation
30	02/15/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event held as scheduled

31	03/12/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event held as scheduled
32	03/22/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event held as scheduled
33	08/18/2014	16:00	Status: Review by Clerk	2	

Full Docket Entries

338 Docket Entries for Docket: MICR2005-00393

Entry Date:	Paper No:	Docket Entry:
03/31/2005	1	Indictment returned
03/31/2005		Assigned to Track "A", see scheduling order
04/06/2005		Habeas corpus for Deft at Cambridge Jail for 4/20/05
04/20/2005		Deft arraigned before Court
04/20/2005		RE Offense 1:Plea of not guilty
04/20/2005		RE Offense 2:Plea of not guilty
04/20/2005		RE Offense 3:Plea of not guilty
04/20/2005		RE Offense 4:Plea of not guilty
04/20/2005		RE Offense 5:Plea of not guilty
04/20/2005		RE Offense 6:Plea of not guilty
04/20/2005		RE Offense 7:Plea of not guilty
04/20/2005		RE Offense 8:Plea of not guilty
04/20/2005		RE Offense 9:Plea of not guilty
04/20/2005		RE Offense 10:Plea of not guilty
04/20/2005		RE Offense 11:Plea of not guilty
04/20/2005		RE Offense 12:Plea of not guilty
04/20/2005		RE Offense 13:Plea of not guilty
04/20/2005		RE Offense 14:Plea of not guilty
04/20/2005		RE Offense 15:Plea of not guilty
04/20/2005		RE Offense 16:Plea of not guilty
04/20/2005		RE Offense 17:Plea of not guilty
04/20/2005		Deft arraigned before Court
04/20/2005		Bail set: \$10,000 cash WOP Cash
04/20/2005		Mittimus issued
04/20/2005		Bail warning read
04/20/2005		Defendant present in court, continued until May 17, 2005 at 2pm in
04/20/2005		courtroom 10B for PTC
04/20/2005		Reporter present: Beers, Lorraine
04/20/2005		Appearance of Deft's Atty: Mark Wester
04/20/2005		Appearance of Commonwealth's Atty: David Marc Solet

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04/20/2005	2	Affidavit of indigency filed; approved (Pasquale,CM)
04/20/2005	3	Statement of appointment, Mark Wester appointed as Counsel for
04/20/2005	3	defendant from the Court list successive order (no further
04/20/2005	3	explanation required) Pasquale, CM
04/20/2005	4	Order assessing statutory fee for appointment of counsel
04/20/2005	5	Commonwealth files commonwealth's statement of the case
04/20/2005	6	Commonwealth files compliance with M.R.C.P. Rule 14 Discovery I
04/20/2005	7	Notice of assignment of counsel filed.
04/21/2005		Habeas corpus for Deft at Old Colony Correctional Center
04/21/2005		(Bridgewater)for 5/17/05 Bail Review
05/17/2005	8	Tracking order (Lauriat,J.) see calendar for events (copies mailed)
06/01/2005	9	Commonwealth files compliance with M.R.C.P. Rule 14 Discovery II
06/02/2005	10	Motion by Deft: To Dismiss Counts 3-6, 9-10, 13-14 Of The Indictment
06/02/2005	10	With Memorandum Of Law And Affidavit In Support Of Motion. (Sent to
06/02/2005	10	Lauriat, J.) +
07/12/2005		Habeas corpus for Deft at Old Colony for 7/20/05
07/13/2005	11	Letter from defendant re: request for suspended sentence (copy to ADA
07/13/2005	11	and Deft's atty.)
07/18/2005	12	Commonwealth files Compliance with M.R.C.P. Rule 14 Discovery III
07/20/2005		Hearing on (P#10) held held, matter taken under advisement (Lauriat,J
07/20/2005		7/20/05)
07/21/2005		Habeas corpus for Deft at Cambridge for 8/17/05
07/22/2005	13	Motion by Deft: For Discovery
08/18/2005		See Order in Margin. Motion Page # 13 -1,2,3 & 5 Agreed Requested
08/18/2005		form Police Dept. 4 & 5 Not in Possession of Commonwealth if to be
08/18/2005		offered in accordance, provide by)ct.17/05 to Deft's Counsel. (Peter
08/18/2005		M. Lauriat, Justice))
08/18/2005		Habeas corpus for Deft at Cambridge Jail for 9/14/05
09/06/2005		RE Offense 13:Dismissed
09/06/2005		RE Offense 14:Dismissed
09/07/2005	14	ORDERED: Re: Motion (P# 10) For the Foregoing reasons, the
09/07/2005	14	defendant's Motion to Dismiss is Denied as to indictments
09/07/2005	14	003,004,005,006,009 and 010, and Allowed as to Indictemnts 013 & 014.
09/07/2005	14	Copies sent to both sides (Peter M. Lauriat, Justice)
09/08/2005	15	Commonwealth files compliance with m.r.c.p. rule 14 discovery IV
09/08/2005	17	Commonwealth files compliance with M.R.C.P. Rule 14 Discovery V
09/12/2005	16	Letter from defendant to (Lauriat, J.)
09/14/2005		Habeas corpus for Deft at Old Colony on October 17, 2005 at 9am in
09/14/2005		ctrm. 10B
10/17/2005	19	Waiver of defendants' rights(copy to Joyce Coleman,CPO)
10/17/2005	18	Commonwealth files Partial Nolle Prosequi #'s 004,006,010,012
10/17/2005		Plea of not guilty changed to guilty; accepted by the court

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10/17/2005		,Commonwealth moves for sentence
10/17/2005		RE Offense 1:Guilty plea
10/17/2005		RE Offense 2:Guilty plea
10/17/2005		RE Offense 3:Guilty plea
10/17/2005		RE Offense 4:Nolle prosequi
10/17/2005		RE Offense 5:Guilty plea
10/17/2005		RE Offense 6:Nolle prosequi
10/17/2005		RE Offense 8:Nolle prosequi
10/17/2005		RE Offense 9:Guilty plea
10/17/2005		RE Offense 10:Nolle prosequi
10/17/2005		RE Offense 11:Guilty plea
10/17/2005		RE Offense 12:Nolle prosequi
10/17/2005		RE Offense 15:Guilty plea
10/17/2005		RE Offense 16:Guilty plea
10/17/2005		RE Offense 17:Guilty plea
10/17/2005		002 Defendant sentenced to Cedar Junction for a term of 5
10/17/2005		years,sentence to run concurrent with 2005-393-007
10/17/2005		007 Defendant sentenced to Cedar Junction for a term not exceeding 7
10/17/2005		years and 1 day or less than 7 years (Lauriat,J.)
10/17/2005		001 see 002 for general sentence, Defendant sentenced to Cedar
10/17/2005		Junction for a term of 5 years sentence to run concurrent with
10/17/2005		2005-393-007
10/17/2005		003 Defendant is placed on Probation for a period of 5 years from
10/17/2005		and after committed sentence 2005-393-007 with the following
10/17/2005		conditions 1) stay away from victim both direct and indirect 2)
10/17/2005		under-go random urine screens 3) weekly reporting to Probation Dept.
10/17/2005		4) intergration into Community thru direction of Probation Dept. 5)
10/17/2005		65.00 Probation Sup. fee is imposed or in lieu of community service
10/17/2005		005,009,011,015,016,017 Defendant is placed on Probation for a period
10/17/2005		of 5 years to run concurrent with 2005-393-003 and from and after
10/17/2005		2005-393-007,see 003 for conditions
10/17/2005		Sentence credit given as per 279:33A: 253 days credit on mittimus
10/17/2005		Mittimus issued to Cedar Junction 007 ,002
10/17/2005		Defendant warned per Chapter 278, Sec 29D of alien status
10/17/2005		Notified of right of appeal under Rule 64
10/17/2005		Attested copy on indictments sent to Cedar Junction records dept.
10/17/2005		#007,001,002
10/17/2005	20	Order on statutory fees (Lauriat,J.)
10/17/2005		Victim-witness fee assessed: \$90.00
10/17/2005		Probation supervision fee assessed: \$65.00 or Community service
10/17/2005		alternative

10/17/2005		Mittimus returned w/o service
10/17/2005		RE Offense 7:Guilty plea
10/20/2005	21	Defendant files motion to revise and revoke sentence with an
10/20/2005	21	Affidavit in Support of Motion (no action requested at this time)
10/20/2005	21	(sent to Judge Lauriat)
10/25/2005		Motion (P#21) No action taken at present time at defendant's request.
10/25/2005		(Peter Lauriat, Justice)
11/02/2005	22	Letter from defendant re: rescinding guilty plea (sent to counsel)
11/14/2005		Victim-witness fee paid as assessed 90.00
11/29/2005		Habeas corpus for Deft at MCI Cedar Junction for 11-30-2005
12/30/2005		Habeas corpus for Deft at Old Colony Corr. on Jan.5, 2005 at 9am in
12/30/2005		ctrm. 10B
01/05/2006	23	Letter received from Defendant and Upon Review and treated as a New
01/05/2006	23	Trial Motion, The Commonwealth is ORDERED to file its written response
01/05/2006	23	within 30 days of this date. Lauriat, J
01/05/2006		Defendant's letter (P#23) Upon review, and treated as a New Trial
01/05/2006		Motion, the Commonwealth is ordered to file its written response
01/05/2006		within 30 days of this date. (Lauriat, J.) notice sent
01/05/2006	24	ORDER: In connection with the court's consideration of the
01/05/2006	24	defendant's request to withdraw his guilty plea, which was tendered
01/05/2006	24	and accepted by the court on October 17, 2005, it is hereby ORDERED
01/05/2006	24	that a transcript be prepared of the defendant's guilty plea colloquy
01/05/2006	24	and sentencing hearing on that date, and that the original be filed
01/05/2006	24	with the court and copies be provided to the District Attorney's
01/05/2006	24	Office Department and the defendant. (Lauriat, J.) notice sent
01/09/2006	25	Court Reporter Hoben, Shawna is hereby notified to prepare one copy
01/09/2006	25	of the transcript of the evidence of October 17, 2005 Change of Plea
01/19/2006	26	Motion by Commonwealth: for extension of filing deadline filed in
01/19/2006	26	court
01/20/2006		Motion (P#26) Allowed (Lauriat,J)
01/30/2006		Habeas corpus for Deft at Old Colony on 2*3-2006
02/13/2006		Habeas corpus for Deft at Old Colony on 3-13-2006
02/13/2006	27	Re: letter from defendant
02/13/2006		Motion (P#27) The Middlesex County Sheriff's Office is requested to
02/13/2006		provide this court with a copy of all reports made or generated with
02/13/2006		respect to the incident which allegedly occurred in the Cambridge
02/13/2006		Jail on November30, 2005 concerning Kenneth Dykens,by or before
02/13/2006		February 28, 2006 (Lauriat,J)
02/27/2006	28	Mittimus returned with service
03/10/2006	29	Habe: returned wo/service
03/21/2006	30	Motion for appointment of new counsel (sent to ADA and Deft's Atty.)
04/04/2006		Habeas corpus for Deft at Old Colony for 4-11-2006

04/11/2006	31	Habe: returned w/service
04/12/2006		Habeas corpus for Deft at Old Colony fo 5-9-2006
04/18/2006		Transcript of testimony received One Volume of October 17, 2005 from
04/18/2006		Court Reporter Shawna Delia Hoban
05/09/2006	32	Motion by Deft: To Withdraw Guilty Plea With Affidavit
05/09/2006		Motion to be referred to CPCS screenign Committee for consideration
05/09/2006		of appointment of counsel.
05/09/2006	33	Motion To Withdraw As Counsel For Defendant With Affidavit In Support
05/09/2006		Motion (P#33) ALLOWED w/o objection of defendant (Peter M. Lauriat,
05/09/2006		Justice).
06/01/2006		Transcript of testimony received One Volume of October 17, 2005
06/01/2006		Change of Pleas from Court Reporter Shawma Hobam (To replaced
06/01/2006		previously filed transcript as that wa a draft only)
06/22/2006	34	Request - Letter Received from Defendant (Re: Disabilities)
06/22/2006		Regarding Request (P # 34) Upon review, the court takes no action on
06/22/2006		this request, since it is without Authority or Jurisdiction to do so.
06/22/2006		This is a matter which should be considered by way of a civil action
06/22/2006		against the Department of Correction (Peter M. Lauriat, Justice) copy
06/22/2006		sent to Defendant 06/23/06 MCI-Shirley, ADA & Deft's Atty.
06/13/2007	35	Notice of assignment of counsel filed.Richard Heartquist, Esq.
06/13/2007	35	C8005687-4
06/19/2007	36	Defendant files revised MOTION to revise and revoke sentence (Copy to
06/19/2007	36	Peter Lauriat, J)
07/09/2007		Motion (P#36) Revised Motion To Revise And Revoke Sentence-- The
07/09/2007		Commonwealth shall serve and file its written response to this motion
07/09/2007		by or before August 17, 2007, and forward a courtesy copy to the
07/09/2007		Court in Suffolk Superior Court (Room 1300). (Peter Lauriat, Justice)
07/09/2007		Both sides notified.
09/25/2007		Appearance of Commonwealth's Atty: Anne C. Pogue
09/25/2007	37	MOTION by Commonwealth: for Leave to File Late Opposition to
09/25/2007	37	Defendant's Motion to Revise and Revoke by or Before November 23,
09/25/2007	37	2007. (Copy to Lauriat, J)
10/31/2007	38	Commonwealth files Opposition to Defendant's Revised Motion to Revise
10/31/2007	38	and Revoke (copy to Lauriat, J)
01/29/2008	39	Clerks minutes of hearing held in Suffolf; Re Motion to Revise and
01/29/2008	39	Revoke Sentence Paper #36 : After hearing taken under advisement
01/29/2008	39	effective 02/11/2008 The court allows until Feb 4,2008 for the
01/29/2008	39	Defendantto submit supporting Legal Documentation and Medical
01/29/2008	39	documentation The court allows until 02/11/2008 for the Comm to file
01/29/2008	39	its response Upon reciept of Documentation the court willt ake the
01/29/2008	39	matter under advisement Lauriat Justice.

02/04/2008	39	MOTION by Commonwealth: Pursuant To Mass. R. Crim. P.42 To Correct
02/04/2008	39	The Docket Sheet
02/04/2008		MOTION (P#39.1 Allowed w/o objection) allowed (Lauriat, J.)
02/05/2008	40	Commonwealth Files Sur-Reply To Documents Recently Filed In Support
02/05/2008	40	Of Defendant's Revised Motion To Revise And Revoke
03/04/2008	41	Order On Defendant's Revised Motion To Revise And Revoke Sentence
03/04/2008	41	--ORDER-- For the forgoing reasons, the Defendant's Revised Motion To
03/04/2008	41	Revise and Revoke is DENIED. (Peter M. Lauriat, Justice)
08/11/2008	42	Treated as a motion to revise and revoke and DENIED. Post sentencing
08/11/2008	42	developments cannot be considered. As the defendant is represented by
08/11/2008	42	counsel,defendants pro se motion for an audiotape of the plea
08/11/2008	42	collequy hearing is DENIED. Lauriat,Peter
11/06/2008	43	Letter from defendant sent to (Lauriat, J.)
11/24/2008		Appearance of Commonwealth's Atty: Hallie White Speight
12/08/2008	45	Motion (P#44) Treating this letter (paper #44) as a request to listen
12/08/2008	45	to court reporter's audiotape recording of the defendant's guilty
12/08/2008	45	plea colloquy in this case, the court will hold a haering at 3:00pm
12/08/2008	45	on January 6, 2009, in Courtroom 704 of the Suffolk County Superior
12/08/2008	45	Court in Boston, at which time the court reporter will play the
12/08/2008	45	audiotape recording of Mr. Dykens' plea colloquy held in the
12/08/2008	45	Middlesex County Superior Court on October 17, 2005. Counsel of
12/08/2008	45	record for the Commonwealth and the defendant shall be notified and
12/08/2008	45	may attend. Mr. Dykens shall be habed in from MCI Shirley Medium, or
12/08/2008	45	from such other institution as may be housing him as of the date of
12/08/2008	45	the hearing. Peter M. Lauriat.
12/09/2008	44	Letter from defendant regarding audio tape. (Sent to (Lauriat, J.)
01/06/2009		Motion (P#44) In response to this letter the court held a hearing on
01/06/2009		this date at which court reporter Shawna Hoban played in court in the
01/06/2009		presence of Kenneth Dykens, the audio tape of his plea colloquy - No
01/06/2009		further action is required at this time. (Peter Lauriat, Justice)
02/11/2010	46	MOTION by Deft: For A Court Orde To Allow The Defendant To Be
02/11/2010	46	Transferred To The Department Of Mental Health Tewksbury Facility For
02/11/2010	46	Treatment Services With Memorandum Of Law
02/11/2010	47	MOTION by Deft: For A Writ Of Haeas Corpus
02/11/2010		Motion (P#46) Upon review, the court is without authority to compel
02/11/2010		or direct the transfer of a sentenced individual to a DMH faculity
02/11/2010		prior to his release from incarceration. Mr. Dykens believes that
02/11/2010		such a tranfer is permissible or even possible, he should consider a
02/11/2010		civil action to require the DOC to do so. (Peter Lauriat, Justice)
07/14/2011		Corrected mittimus issued on 7/13/2011
01/11/2012		cert copies sent on 1/11/2012 to Steve Mulloy, Probation
06/07/2012	48	Clerk's Minutes Of Probation Hearing @ 9:30 a.m.; Matthew Day, First

06/07/2012	48	Asst.Clerk Magistrate; Appointment Of Counsel; Result: Warrant to
06/07/2012	48	Issue; Assistant Clerk Dennis F.Collins
06/07/2012	49	Clerk's Minutes Of Probation Hearing @ 10:45am; Michael
06/07/2012	49	A.Sullivan,Esq., Clerk Magistrate; Probation Officer Vanessa Banks;
06/07/2012	49	Defense Attorney: Sean Delaney (apptd); Appointment Of Counsel;
06/07/2012	49	Continued to June 19,2012 for Surrender in Rm 530 at 2pm; Result:
06/07/2012	49	Warrant expunged from the record. Personal recognizance; Assistant
06/07/2012	49	Clerk Dennis F.Collins
06/07/2012	50	Affidavit of indigency filed; APPROVED, Committee for Public Counsel
06/07/2012	50	Services appointed; receives food stamps; receives Supplementary
06/07/2012	50	Security Income (SSI). (Michael Sullivan, Clerk Magistrate)
06/07/2012	51	Notice of assignment of counsel filed. c50059682 Sean Delaney,Esq.
06/07/2012	51	(Dennis F.Collins, Assistant Clerk)
06/07/2012		Appearance of Deft's Atty: Sean T Delaney
06/07/2012	52	Statement of Appointment of Sean T Delaney pursuant to SJC Rule 1:07
06/07/2012	52	(Dennis F.Collins, Assistant Clerk)
06/07/2012	53	ORDER ASSESSING STATUTORY FEE FOR APPOINTMENT OF COUNSEL. By the
06/07/2012	53	Court (Dennis F.Collins, Assistant Clerk)
06/07/2012		Legal counsel fee assessed in the amount of \$150.00 (Dennis
06/07/2012		F.Collins, Assistant Clerk)
06/07/2012	54	Habe: returned w/service
06/19/2012	55	Clerks Minutes on Probation Hearing: Hogan, J. presiding; PO Banks;
06/19/2012	55	Defense Counse Delaney; Final Surrender hearing; RESULT: Deft found
06/19/2012	55	in violation. Probation is continued to the original date; Court
06/19/2012	55	reporter Goldberg; M. Toomey/AC
07/09/2012	56	Bail satisfied: \$250.00 Cash Ck. #13145 Surety Kenneth Dykens, 100
07/09/2012	56	Meridian Street, East Boston, Ma 02128
07/16/2012		Bail in the amount of \$250. returned to Surety K Dykens Check #2208
07/23/2012	57	Clerks Minutes Of Probation Hearing: Matt Day, Presiding; Probation
07/23/2012	57	Officer Paul Cashman; Result: Defendant Defaulted Warrant to Issue;
07/23/2012	57	Assistant Clerk Mary Aufiero
07/23/2012		Defendant defaulted; warrant to issue (Probation Warrant)
07/30/2012	58	Petition for review of decision denying release on personal
07/30/2012	58	regognizance or on execution of an unsecured appearance bond (sent to
07/30/2012	58	Paul Cashman,PO)
08/23/2012	59	Clerk's Minutes Of Probation Hearing: Matthew Day, First Asst. Clerk
08/23/2012	59	Magistrate; Probation Officer: Vanessa Banks; Defense Attorney:
08/23/2012	59	Marcia Kovner (apptd); Appointment Of COunsel; Warrant Removed;
08/23/2012	59	Continued to October 25,2012 for Surrender in Rm 530 at 2pm; Result:
08/23/2012	59	Held without bail, without Prejudice. Mitt Issued; Assistant Clerk:
08/23/2012	59	Dennis F.Collins

08/23/2012		Default removed; warrant recalled
08/23/2012	60	Affidavit of indigency filed; APPROVED, Committee for Public Counsel
08/23/2012	60	Services appointed. (Matt Day, First Assistant Clerk)]
08/23/2012	61	Statement of Appointment of Marcia T Kovner pursuant to SJC Rule 1:07
08/23/2012	61	(Matthew Day, Esq. 1st Asst. Clerk Magistrate)
08/23/2012	62	Notice of assignment of counsel filed. c50978561 Marcia T.Kovner,Esq.
08/23/2012	62	(Dennis F.Collins, Assistant Clerk)
08/23/2012	63	ORDER Assessing Statutory Fee For Appointment Of Counsel. By The
08/23/2012	63	Court (Dennis F.Collins, Assistant Clerk) Dated: August 23,2012
08/23/2012	64	Mittimus issued
11/26/2012		Letter from defendant to Lauriat,J mailed this day
11/26/2012	65	MOTION by Deft: To Release Defendant From Wrongful Term's Of
11/26/2012	65	Probation; and Affidavit
11/26/2012		MOTION (P#65) Since defendant is represented by counsel with respect
11/26/2012		to his ongoing probation motions
12/17/2012		Letter from defendant re transcripts (sent to 530)
02/15/2013	65	Clerks Minutes On Probation Hearing: (Lauriat,J.) Presiding;
02/15/2013	65	Probation Officer: Kovner; Assistant D.A.: Alyson Brown; Final
02/15/2013	65	Surrender Hearing; Continued to 3/12/13 for Day 2 Of Hearing; Result:
02/15/2013	65	Def. Attorney is Allowed to Withdrsw-Def is Allowed To Proceed
02/15/2013	65	Pro-Se; Assistant Clerk: Mark Toomey
02/22/2013	66	Commonwealth files memorandum in opposition to defendants motion to
02/22/2013	66	terminate/dismiss probation term for violation of the
02/22/2013	66	district/municipal court rules of probation violation procedures
02/22/2013	67	MOTION by Deft: for ineffective assistance of counsel with a
02/22/2013	67	memorandum attached sent to 530
02/22/2013	68	MOTION by Deft: for bail review (sent ot Lauriat,J)
03/06/2013	69	MOTION by Deft: petition for bail review for superior court
03/06/2013	69	2005-393-003 and District Court case 1253cr001791-A-D
03/06/2013	70	MOTION by Deft: supplemental to commonwealths memorandum in
03/06/2013	70	opposition to defendants motion to dismiss or terminate probation
03/06/2013	71	Deft files factual and procedural background
03/06/2013	72	MOTION by Deft: to dismiss
03/06/2013	73	MOTION by Deft: for manditory discovery non-compliance of commonwealth
03/22/2013	74	Clerks Minutes on probation hearing: (Lauriat,J) Presiding Deft
03/22/2013	74	Counsel pro-se ADA Rubin/braur Final surrender hearing Defendant
03/22/2013	74	found in violation of probation on009 Defendant sentenced to 2 years
03/22/2013	74	HOC 241 days jailcredit on 001 defendant sentenced to 2 years HOC
03/22/2013	74	from and after 009 0 days jail credit on 015,016,017 probation is
03/22/2013	74	Terminated
03/22/2013		Reporter present: Goldberg, Erika
03/22/2013	75	MOTION by Deft: to amend

R. 12

04/11/2013	76	ORDERED: Probation terminated; Deft discharged (Tuttman,J)
10/11/2013	77	MOTION by Deft: To Vacate; and Memorandum Of Law. (COPY MAILED TO
10/11/2013	77	JUDGE LAURIAT @ SUFFOLK SUPERIOR COURT)
05/05/2014		Appearance of Deft's Atty: Timothy St. Lawrence
08/18/2014	78	Commonwealth files Opposition To Defendant's "Motion To Vacate" (COPY
08/18/2014	78	MAILED TO JUDGE LAURIAT @ SUFFOLK SUPERIOR COURT)
09/02/2014	79	MOTION by Deft: to vacate
09/02/2014		MOTION (P#79) Upon review and for the reasons set forth in the
09/02/2014		commonwealths opposition memorandum, this motion to vacate is denied
09/02/2014		(Lauriat, Justice). Copies mailed
09/24/2014	80	NOTICE of APPEAL FILED by Kenneth Dykens
10/10/2014	81	Notice of assembly of record; two certified copies of docket entries,
10/10/2014	81	one set of the transcript of evidence and P#80 Notice of appeal sent
10/10/2014	81	to the clerk of the appeals court this day
10/10/2014		Notice of assembly of record; sent to jim Sahakian, ADA and Timothy
10/10/2014		St. Lawrence,Esq
10/20/2014	82	Notice of Entry of appeal received from the Appeals Court

Charges

17 Charges for Docket: MICR2005-00393

No.	Charge Description:	Indictment:	Status:
1	ATTEMPT TO COMMIT CRIME c274 s6		Guilty plea
2	HABITUAL CRIMINAL		Guilty plea
3	ATTEMPT TO COMMIT CRIME c274 s6		Guilty plea
4	HABITUAL CRIMINAL		Nolle prosequi
5	ATTEMPT TO COMMIT CRIME c274 s6		Guilty plea
6	HABITUAL CRIMINAL		Nolle prosequi
7	ASSAULT TO MAIM c265 s15		Guilty plea
8	HABITUAL CRIMINAL		Nolle prosequi
9	A&B WITH DANGEROUS WEAPON c265 s15A(b)		Guilty plea
10	HABITUAL CRIMINAL		Nolle prosequi
11	BURGLARIOUS INSTRUMENT, POSSESS c266 s49		Guilty plea
12	HABITUAL CRIMINAL		Nolle prosequi
13	DESTRUCTION OF PROPERTY +\$250, MALICIOUS c266 s127		Dismissed
14	HABITUAL CRIMINAL		Dismissed
15	A&B ON PUBLIC EMPLOYEE c265 s13D		Guilty plea
16	A&B ON PUBLIC EMPLOYEE c265 s13D		Guilty plea
17	RESIST ARREST c268 s32B		Guilty plea

R. 13

Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of
Middlesex aforesaid, did attempt to break and enter the dwelling house of John Cram and Jacqui Cram in the
nighttime with intent to commit a felony therein, and in such attempt did smash a glass sliding door in order to
facilitate entry into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted
offense, or was intercepted, or prevented in the perpetration of the said attempted offense.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

John Woodell
Foreperson of the Grand Jury.

[Signature]
Assistant District Attorney.

Superior Court

March Sitting, 2005

24th day - Returned by the Grand Jury and filed in Court.

ORIGINAL

Paul A. [Signature]
Assistant Clerk

2865-393-801

R. 14

Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

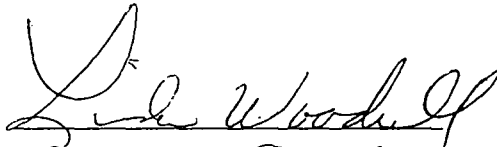
THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,


That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of Middlesex aforesaid, did attempt to break and enter the dwelling house of John Cram and Jacqui Cram in the nighttime with intent to commit a felony, and in such attempt did remove an outer screen in order to facilitate entry into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted offense, or was intercepted, or prevented in the perpetration of the said attempted offense.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.


Foreperson of the Grand Jury.


Assistant District Attorney.

Superior Court

March Sitting, 2005

12th day - Returned by the Grand Jury and filed in Court.


Assistant Clerk

9005392.003

ORIGINAL

R. 15

Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of
Middlesex aforesaid, did attempt to break and enter the dwelling house of John Cram and Jacqui Cram in the
nighttime with intent to commit a felony therein, and in such attempt did position a ladder in order to facilitate entry
into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted offense, or was
intercepted, or prevented in the perpetration of the said attempted offense.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Leah Woodall
Foreperson of the Grand Jury.

MS
Assistant District Attorney.

Superior Court

March Sitting, 2005

12th day - Returned by the Grand Jury and filed in Court.

David Chiswick
Assistant Clerk

ORIGINAL

2005-393-005

R.16

Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of Middlesex aforesaid, did knowingly have in his possession certain machines, tools or implements, to wit: a heavy rock, adapted and designed for cutting through, forcing or breaking open buildings, rooms, vaults, safes or other depositories, in order to steal therefrom such money and other property as might be found therein or to commit any other crime said KENNETH DYKENS knowing said machines, tools or implements to be adapted and designed for the purpose aforesaid, and intending to use or employ them therefor.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Rich Woodruff
Foreperson of the Grand Jury.

MSJ
Assistant District Attorney.

Superior Court

March Sitting, 2005

12 day - Returned by the Grand Jury and filed in Court.

David A. Senechal
Assistant Clerk

ORIGINAL

0005393.011

R.17

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 2005-393

COMMONWEALTH OF MASSACHUSETTS

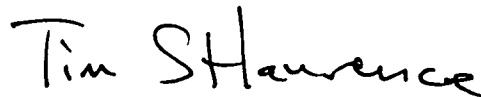
V.

KENNETH DYKENS

MOTION TO VACATE

Under Massachusetts Rule of Criminal Procedure 30(a), the defendant respectfully moves this court to vacate his convictions on indictments 003, 005, and 011. The reasons for this motion are set forth in the accompanying memorandum of law.

Respectfully submitted,
KENNETH DYKENS
By his attorney



Timothy St. Lawrence
BBO #676899
11 S Angell St #252
Providence RI 02906
508 431 3005
tstlawrence@gmail

Dated: October 11, 2013

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPARTMENT
DOCKET NO. 2005-393

COMMONWEALTH OF MASSACHUSETTS

V.

KENNETH DYKENS

MEMORANDUM OF LAW

HISTORY

On March 31, 2005, a Middlesex County grand jury returned a seventeen count indictment against the defendant Kenneth Dykens alleging attempt to commit unarmed burglary (001, 003 and 005), assault with intent to maim (007), assault and battery by means of a dangerous weapon (009), possession of burglarious instruments (011), malicious destruction of property over \$250 (013), assault and battery on a police officer (015 and 016), and resisting arrest (017). Indictments 002, 004, 006, 008, 010, 012, and 014 did not allege free-standing crimes; each alleged a sentencing enhancement under the habitual criminal offender statute, G.L. c. 279, § 25.

On June 2, 2005, Mr. Dykens moved to dismiss two of the three charges of attempted breaking and entering (003 and 005), on the ground that they were duplicative; he further moved to dismiss the charge of assault and battery with a

dangerous weapon (009) and malicious destruction of property (013), on the ground that the grand jury did not hear sufficient evidence to establish probable cause to indict him on those charges. Judge Peter M. Lauriat denied his motion on indictments 003, 005, and 009, but granted his motion on indictment 013. [A. 6].¹

On October 17, 2005, Mr. Dykens pleaded guilty to the remaining substantive charges and the Commonwealth nol prossed habitual offender indictments 004, 006, 008, 010, 012.² Judge Lauriat sentenced Mr. Dykens as follows: on indictment 007, seven years to seven years one day, committed, state prison; on indictment 001, five years, committed, state prison, concurrent with 007; on indictment 003, five years, probation, from and after the committed sentence on 007; on indictments 005, 009, 011, 015, 016, 017, five years, probation, concurrent with 003, from and after 007.

On March 22, 2013, Judge Lauriat held a probation surrender hearing. He found Mr. Dykens violated his probation and sentenced him as follows: on indictment 009, two years, committed, house of correction; and on indictments 015, 016, 017, two years, committed, house of correction, from and after 009.

¹ The appendix to this memorandum is cited as [A. pg].

² Mr. Dykens also pleaded guilty to indictment 002, which, as noted earlier, alleged a sentencing enhancement under the habitual offender statute. Indictment 002 was therefore subsumed by indictment 001 and Mr. Dykens sentenced accordingly.

FACTS

In his decision on Mr. Dykens' motion to dismiss, Judge Lauriat set forth the facts presented to the grand jury:

On March 29, 2005, a grand jury sitting in Cambridge heard testimony from Officer Brian Killion and Officer Robert Selfridge alleging the following facts. On February 10, 2005 at approximately 2:30 a.m., the Malden police received a call for assistance from 124 Granite Street in Malden, the residence of John and Jacqui Cram. The Crams told officers that they were asleep on the second floor when John Cram ("John") was awoken by a loud noise from downstairs. John went downstairs to investigate. When he entered the kitchen, he saw that one of the glass doors leading from the kitchen to a deck had been broken, and there was a large rock amidst the broken glass on the floor. When he approached the door he also noticed that a ladder he kept at the side of the house had been moved to the deck and was partially propped up against the house. John then saw the shadow of a person running across the back yard. Police later found a screen on the ground outside the house that had been on the first-floor window just above the cellar door. It appeared to police that someone had stood on the ledge over the cellar door and attempted to gain entry through that window.

When the police arrived, they followed footprints in the snow leading to a wooded area nearby. There they found Dykens. When the officers tried to arrest him, Dykens struggled, striking out at the officers, gouging Officer Killion's eye with his finger, and kicking Officer Killion in the face with his shod foot. [A. 2-3].

At the plea colloquy, the prosecutor recounted the same facts. [A. 7-12].

ARGUMENT

I.

Mr. Dykens' attempt convictions on indictments 003 and 005 should be vacated and dismissed because both are duplicative of his attempt conviction on indictment 001.

The elements of criminal attempt, G.L. c. 274, § 6, are (1) specific intent, (2) an overt act, and (3) non-achievement of the substantive crime. *Commonwealth v. Bell*, 455 Mass. 408, 412 (2009). Here, Mr. Dykens was convicted of three counts of attempted burglary, each based on a different "overt act" he took while attempting to enter a Malden house one night in February 2005: (001) threw rock through sliding glass door; (003) propped ladder against house; and (005) removed screen from first floor window. Trial counsel moved before the plea agreement to dismiss indictments 003 and 005 as duplicative of indictment 001.

[R.]. The trial court denied the motion:

In this case, General Laws c. 274, § 6 is clear. It prohibits the "attempt to commit a crime by doing any act toward its commission that fails in its perpetration...." If the legislature intended for a single attempt charge to cover all overt acts directed toward the commission of a single crime, it would have used the words "any act or acts," rather than "any act." "It is a fundamental principle of statutory construction that 'statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result.'" [Citations omitted]. Consequently, Indictments 003 ... [and] 005 must stand. [A. 3-4].

To the contrary, those convictions cannot stand. First, the trial court's analysis ignored the legislature's own "Rules for construction of statutes," embodied in G.L. c. 4, § 6, Fourth:

Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter.

Thus, “any act” in the criminal attempt statute actually means “any act or acts.” From this alternatively singular or plural meaning, it should be inferred that “the legislature intended for a single attempt charge to cover all overt acts directed toward the commission of a single crime.” See *Commonwealth v. Botev*, 79 Mass. App. Ct. 281, 286 (2011)(“The appropriate inquiry in a case like this asks what ‘unit of prosecution’ was intended by the Legislature as the punishable act.”). At the very least, the construction of “any act” as “any act or acts” creates an ambiguity in the attempt statute, which should be resolved, under the rule of lenity, in favor of Mr. Dykens. See *id.*

Also “[r]elevant to discerning a criminal statute’s unit of prosecution is the continuous offense doctrine, which recognizes that certain criminal statutes are intended to punish just once for a continuing course of conduct, rather than for each and every discrete act comprising that course of conduct.” *Commonwealth v. Horne*, 2013 Mass. Lexis 711, *19 (Sept. 16, 2013). Here, Mr. Dykens’ overt acts “were part of a continuous stream of conduct occurring within a short time frame and governed by a single criminal design”; it was therefore error to divide the conduct into three “discrete units for prosecution.” *Commonwealth v. Howze*, 58 Mass. App. Ct. 147, 153 (2003)(offenses duplicative based on “unity of time, place, and intent”). Otherwise criminal attempt would be coextensive

with one of its elements, so that every overt act constituted a separate attempt. See *United States v. Resendiz-Ponce*, 549 U.S. 102, n.5 (2007) (unrealistic to treat every overt act as a separate criminal attempt; such an approach “would perversely enhanc[e], rather than avoid[], the risk of successive prosecution for the same wrong.”). And, depending on the number of overt acts, a defendant could end up being punished more severely for attempting to commit a substantive offense than if he had actually committed the substantive offense. The Legislature could not have intended that result. See *Botev*, 79 Mass. App. Ct. at 288-89 (convictions duplicative where contrary finding could produce absurd and unreasonable results).

For these reasons, the three attempt convictions here are duplicative. Moreover, Mr. Dykens can properly challenge the duplicative convictions by this Mass. R. Crim. P. 30(a) motion, even where he pleaded guilty to the duplicative indictments and “even where the punishment is concurrent.” *Commonwealth v. Negron*, 462 Mass. 102, 105, 108 (2012). This court should therefore vacate the convictions on indictments 003 and 005 and dismiss those indictments.

II.

Mr. Dykens conviction on indictment 011 of possession of burglarious tools should be vacated and dismissed because that indictment failed to state a crime.

G.L. c. 266, § 49, prohibits the possession of burglarious tools:

Whoever makes or mends, or begins to make or mend, or knowingly has in his possession, an engine, machine, tool or implement adapted and designed for cutting through, forcing or breaking open a building, room, vault, safe or other depository, in order to steal therefrom money or other property, or to commit any other crime, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ or allow the same to be used or employed for such purpose ... shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

The rock thrown by Mr. Dykens, however, was not “adapted and designed” for breaking into a house. While there is no Massachusetts case on point, the Oregon Appeals Court’s decision in *State v. Reid*, 36 Ore. App. 417 (1978), supports this conclusion. There, the court held that a beer bottle used to break a jewelry store window was not a burglar’s tool under the Oregon statute, which similarly to G.L. c. 266, § 49, defined a burglar’s tool as “any tool, instrument, or other article adapted, designed or commonly used for committing or facilitating a forcible entry.” *Id.* at 424. The court found that neither a beer bottle nor a piece of concrete was reasonably adapted to forcible entry and that their use for that purpose did not change their character. *Id.* at 428. (burglar’s tools are defined in terms of their character and not necessarily their use). The court rejected the state’s argument that “adapted” meant “was actually used”: “The actual use of the item may be a demonstration it is capable of such use, but it is not sufficient,

in and of itself, to establish that the item is ‘adapted, designed, or commonly used for committing forcible entry.’” *Id.* at 426-427.

For these reasons, there is no crime of possession of burglarious tools, to wit a rock, even where the rock is used to forcibly enter a house. See *id.* at 428. See also *State v. O’Keefe*, 40 Ore. App. 685, 695 (1979) (neither a rock nor a brick is a burglar’s tool). “A conviction on an indictment that charges no crime would be sheer denial of due process.” *Commonwealth v. Wilson*, 72 Mass. App. Ct. 416, 418 (2008), quoting *Commonwealth v. Palladino*, 358 Mass. 28, 31 (1970).

Because “[n]o court has jurisdiction to sentence a defendant for that which is not a crime,” *Wilson*, 72 Mass. App. Ct. at 418, quoting *Commonwealth v. Andler*, 247 Mass. 580, 582 (1924), a jurisdictional defect may be raised at any time and is not waived by a defendant’s guilty plea. *Commonwealth v. Clark*, 379 Mass. 623, 626 (1980). Mr. Dykens can therefore properly challenge his conviction on indictment 0011 by this Mass. R. Crim. P. 30(a) motion. *Wilson* at 418. See also *Commonwealth v. Buckley*, 76 Mass. App. Ct. 123, 124 (2010). This court should vacate the conviction on indictment 011 and dismiss that indictment.

III.

Even if indictment 011, alleging possession of burglarious tools, did indeed state a crime, Mr. Dykens' conviction on that indictment should be vacated and dismissed where duplicative of his attempt conviction on indictment 001.

As stated above, Mr. Dykens was convicted of possession of burglarious tools, to wit a rock. Because a rock is an ordinary tool within the meaning of G.L. c. 266, § 49, "there must be proof of an intent to use [it] for burglarious purposes." *Commonwealth v. Dellinger*, 10 Mass. App. Ct. 549, 561 (1980). This intention "must appear clearly from the circumstances in which [the tool is] found." *Id.* Here, the rock was found among the shattered glass of a kitchen door. This no doubt proved Mr. Dykens' intent to use the rock for burglarious purposes. See *Commonwealth v. Porter*, 70 Mass. App. Ct. 901, 902 (2007) (defendant intended to use wire cutters, an ordinary tool, for burglarious purposes, where the wire cutters "were discovered between the storm door and the front door after the defendant was found in that exact location").

However, the problem is that Mr. Dykens was already punished under the criminal attempt statute for throwing the rock. Thus, Mr. Dykens was punished twice for the same criminal act: throwing a rock through the sliding glass door. See *Commonwealth v. Santos*, 440 Mass. 281, 293 (2003) ("even if not literally a lesser included offense, a conviction may be duplicative if the crimes are so closely linked to a single event as to constitute a single crime"). See also *Commonwealth v. Jones*, 382 Mass. 387, 393-94 (1981) (though non-cognate offenses, vehicular homicide and manslaughter "sufficiently closely related so as

to preclude punishment on both”); *Commonwealth v. Kuklis*, 361 Mass. 302, 308 (1972)(“it was not the legislative intent that a defendant should be punished for both possession of a drug and being present where the drug was kept, where the two charges involve the same time and place, and the identical mass of a single drug).” But see *Commonwealth v. Vick*, 454 Mass. 418, 436 (2009)(where “neither crime is a lesser included offense of the other, multiple punishments are permitted even where the offenses arise from the very same criminal event”).

As a result, Mr. Dykens’ conviction for possession of burglarious tools (011) was duplicative of his conviction for criminal attempt (001). Moreover, this Mass. R. Crim. P. 30(a) motion is the proper vehicle to challenge the conviction on indictment 011 as duplicative of the conviction on indictment 001. *Negron*, 462 Mass. at 105, 108. This court should therefore vacate the conviction on indictment 011 and dismiss that indictment.

CONCLUSION

For these reasons, Mr. Dykens asks this Honorable court to grant the motion to vacate the convictions on indictments 003, 005, and 011 and dismiss those indictments.

Respectfully submitted,

Kenneth Dykens

By his attorney,

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October 11, 2013

APPENDIX

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. 2005-393(001-017)

COMMONWEALTH

v.

KENNETH DYKENS

MOTION TO DISMISS COUNTS 3-6, 9-10, 13-14
OF THE INDICTMENT

Kenneth Dykens ("Dykens") stands indicted on seventeen charges arising from an incident that allegedly occurred on the evening of February 10, 2005, at 124 Granite Street in Malden, Massachusetts. The indictments allege attempt to commit unarmed burglary (001, 003 and 005), assault with intent to maim (007), assault and battery by means of a dangerous weapon (009), possession of burglarious instruments (011), malicious destruction of property over \$250 (013), being a habitual criminal (002, 004, 006, 008, 010, 012 and 014), assault and battery on a public employee (015 and 016), and resisting arrest (017).

Dykens has now moved to dismiss two of the three charges of attempted breaking and entering (003 and 005), on the ground that they are duplicitous. He further moves to dismiss the charges of assault and battery with a dangerous weapon (009) and malicious destruction of property (013), on the grounds that the grand jury did not hear sufficient evidence to establish probable cause to indict him on those charges. Dykens also seeks dismissal of the charge of being a habitual offender

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(004, 006, 010 and 014) that corresponds to each of these particular indictments.

BACKGROUND

On March 29, 2005, a grand jury sitting in Cambridge heard testimony from Officer Brian Killion and Officer Robert Selfridge alleging the following facts. On February 10, 2005 at approximately 2:30 a.m., the Malden police received a call for assistance from 124 Granite Street in Malden, the residence of John and Jacqui Cram. The Crams told officers that they were asleep on the second floor when John Cram ("John") was awoken by a loud noise from downstairs. John went downstairs to investigate. When he entered the kitchen, he saw that one of the glass doors leading from the kitchen to a deck had been broken, and there was a large rock amidst the broken glass on the floor. When he approached the door he also noticed that a ladder he kept at the side of the house had been moved to the deck and was partially propped up against the house. John then saw the shadow of a person running across the back yard. Police later found a screen on the ground outside the house that had been on the first floor window just above the cellar door. It appeared to police that someone had stood on the ledge over the cellar door and attempted to gain entry through that window.

When the police arrived, they followed footprints in the snow leading to a wooded area nearby. There they found Dykens. When the officers tried to arrest him, Dykens struggled, striking out at the officers, gouging Officer Killion's eye with

his finger, and kicking Officer Killion in the face with his shod foot.

DISCUSSION

I.

Dyken argues that the attempted breaking and entering events alleged by the Commonwealth, including the removal of the screen from a window, the propping of a ladder against the house and the throwing of a rock through a sliding glass door constitute only one continuing attempt to break-in to the Cram's house. He therefore moves to dismiss two of the three indictments for attempted breaking and entering and the corresponding habitual offender charges.

"[W]here a single statute is involved and the issue is whether two or more discrete offenses were proved under that statute rather than a single continuing offense, the question becomes whether the Legislature intended to authorize more than one conviction." *Commonwealth v. Decicco*, 44 Mass. App. Ct. 111, 112 (1998)(internal citations omitted); *Commonwealth v. Levia*, 385 Mass. 345, 347-351 (1982). "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Commonwealth v. Donovan*, 395 Mass. 20, 29 (1985).

In this case, General Laws c. 274, § 6 is clear. It prohibits the "attempt to commit a crime by doing any act toward its commission that fails in its perpetration" If the legislature intended for a single attempt charge to cover all overt acts directed toward the commission of a single crime, it would have used the words "any

act or acts,” rather than “any act.” “It is a fundamental principle of statutory construction that ‘statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result.’” *Commonwealth v. Hatch*, 438 Mass 618, 632 (2003), citing *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001). Consequently, Indictments 003, 004, 005, and 006 must stand.

II.

Dyken next argues that the charge of assault and battery by means of a dangerous weapon (009) must be dismissed because the grand jury did not hear sufficient evidence to find probable cause to indict him for this offense. *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982). Citing *Commonwealth v. Lord*, Dyken argues that the Commonwealth is required to produce evidence that the alleged victim of the assault and battery was hurt, or suffered an injury that was “more than merely transient and trifling.” *Lord*, 55 Mass. App. Ct. 265, 269 at n. 7(2002). Dyken misreads this portion of *Lord*, which discusses not the requisite degree of bodily harm that the victim must suffer, but whether the deadly weapon is *capable of causing* death or the requisite degree of bodily harm. *Id.* “A conviction for assault and battery by means of a dangerous weapon requires proof only that the defendant intentionally and unjustifiably used force, however slight, upon the person of another by means of an instrumentality capable of causing bodily harm.” *Quincy*

Mut. Fire Ins. Co. v. Abernathy, 393 Mass. 81, 87 (1984).

The grand jury heard testimony that Dykens struggled with officers and then kicked Officer Brian Killion in the face with his shod foot. “Footwear, when used to kick, can be a ‘dangerous weapon.’” *Commonwealth v. Marrero*, 19 Mass. App. Ct. 921, 922 (1984). The grand jury heard sufficient testimony to support the indictment for assault and battery with a dangerous weapon in this case.

III.

Dykens also argues that the indictment for malicious destruction of property over \$250 (013) must be dismissed along with the corresponding habitual criminal charge (014) because a defendant cannot have both acted maliciously, as required for this indictment, and have been attempting to commit burglary, as charged in several of the other indictments.

The real issue in this case, however, is whether the grand jury heard evidence that the destruction was both wilful and malicious. G. L. c. 266, § 127. A defendant acts wilfully if he “intended both the conduct and its harmful consequences; wilful conduct is ‘intentional and by design in contrast to that which is thoughtless or accidental.’” *Commonwealth v. Cimino*, 34 Mass. App. Ct. 925, 927 (1993). Certainly throwing a rock through a window during an attempted breaking and entering is wilful.

However, it cannot be inferred from the evidence presented to the grand jury,

that the destruction of property was malicious. It is well established that “‘malice’ requires a showing that the actor was motivated by cruelty, hostility or revenge.” *Id.*; *Commonwealth v. Armand*, 411 Mass. 167, 170 (1991); *Commonwealth v. Schuchardt*, 408 Mass. 347, 352 (1991); and *Commonwealth v. Peruzzi*, 15 Mass. App. Ct. 437, 443 (1983). The grand jury heard no evidence that the defendant acted with cruelty, hostility or revenge. “An essential element of the crime may not be based on surmise, conjecture, or guesswork.” *Commonwealth v. Moreton*, 48 Mass. App. Ct. 215, 217 (1999). The indictment for malicious destruction of property, and the corresponding habitual criminal charge must therefore be dismissed.¹ McCarthy, 385 Mass. at 163.

ORDER

For the foregoing reasons, the defendant’s Motion to Dismiss is DENIED as to indictments 003, 004, 005, 006, 009 and 010, and ALLOWED as to indictments 013 and 014.



Peter M. Lauriat
Justice of the Superior Court

Dated: September 6, 2005

¹ While the Commonwealth cites *Commonwealth v. Ford* for the proposition that breaking glass during a robbery amounts to malicious destruction of property, the defendant in that case “did not dispute that the evidence . . . was ample to support the verdicts,” but argued other points. *Ford*, 20 Mass. App. Ct. 575, 577 (1985).

1 THE COURT: Are you willing to do so?

2 MR. DYKENS: Yes, sir.

3 THE COURT: Do you understand that by
4 pleading guilty here today, you are giving up
5 your right to pursue any motions that your
6 attorney may have filed on your behalf in this
7 case?

8 MR. DYKENS: Yes, sir.

9 THE COURT: You understand you're also
10 giving up your right to appeal any rulings or
11 decisions that the court may have made against
12 you in this case up to this point in time?

13 MR. DYKENS: Yes, sir.

14 THE COURT: Are you willing to give up
15 each of these rights?

16 MR. DYKENS: Yes, sir. I'd just like
17 to read a statement to the court before the
18 sentencing.

19 THE COURT: Okay, I'll let you do that.

20 I'm going to ask you now, Mr. Dykens,
21 to listen carefully to Mr. Solet, the Assistant
22 District Attorney. He's going to recite to you
23 and to me the statement or summary of the
24 evidence that would be presented against you by

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1 the Commonwealth in the event we went to trial on
2 these charges.

3 When he's finished, I'm going to ask
4 you some questions to be sure you've heard what
5 Mr. Solet said, you understand what he said, you
6 accept and agree with what he said, if you do,
7 and if there's anything you disagree with or that
8 you say is different, I want you to tell me that
9 as well.

10 MR. DYKENS: Yes, sir.

11 THE COURT: Go ahead, Mr. Solet.

12 MR. SOLET: Thank you, Your Honor.

13 Had this case proceeded to trial, the
14 Commonwealth would have called witnesses whose
15 testimony evidenced the following facts.

16 That on or about February 10, 2005, at
17 approximately 2:30 in the morning, Malden Police
18 Officers Robert Southbridge and Ryan Killian were
19 dispatched to 124 Granite Street, the residence
20 of John and Jackie Kram [ph.]. The Krams had
21 called 911 after they heard the sounds of
22 breaking glass and saw a figure moving around on
23 their property. They also observed that the
24 ladder that had been laying flat behind the house

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1 had been moved to provide access to a second
2 story window by some unknown party.

3 When officers arrived, they saw that in
4 addition to the ladder having been moved, a
5 screen had been torn off the first floor window
6 and that the sliding glass door at the rear of
7 the house had been smashed. A large rock which
8 had not previously been on the deck was in the
9 immediate vicinity of the broken glass by the
10 rear door and it's clear that was the instrument
11 with which the door had been smashed.

12 Officers noticed fresh and distinct
13 footprints in the snow which appeared to have
14 been made by a sneaker, the positioning of which
15 suggested that the individual had been trying to
16 force the rear door. Officer Southbridge began
17 to track those prints and followed them through
18 neighboring streets and yards and over a chain
19 link fence until they lead him to the defendant
20 before you, Kenneth Dykens, who was, at that
21 point, crouched and hiding in a rocky area. When
22 the officer ordered the defendant, Mr. Dykens,
23 not to move, Dykens responded, quote, I fucking
24 did it, so just shoot me.

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1 Officer Southbridge ordered Dykens to
2 lay down flat. Mr. Dykens refused, instead
3 attempting to climb a rock ledge and escape.
4 When Officer Southbridge again demanded him to
5 stop, the defendant swept away the officer's arm,
6 then came at him with his hands raised. Officer
7 Southbridge then sprayed Mr. Dykens with his
8 department issue OC spray repeatedly. It
9 appeared to have no effect.

10 Dykens, still cursing that officer,
11 tackled Southbridge and the two rolled down a
12 rocky hill through briars and branches. While
13 Southbridge tried to call for assistance, Dykens
14 continued punching him in the face and head.
15 Ultimately, Officer Killian arrived to try to
16 assist in taking Mr. Dykens in to custody.

17 During the struggle, the defendant, Mr.
18 Dykens, put his hand on Officer Southbridge's
19 face and intentionally gouged that officer's
20 right eye while with another hand grabbed at the
21 officer's mouth. During the struggle, Dykens was
22 continually punching and kicking at the officers.
23 During the entirety of the interaction with Mr.
24 Dykens, both officers were dressed in full

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1 uniform with police badges and insignia
2 prominently displayed.

3 Though they warned him repeatedly that
4 he was under arrest and ordered him to stop
5 resisting, Mr. Dykens fought fiercely and refused
6 to comply with their demands. After he was
7 finally secured in handcuffs, officers tried to
8 stand the defendant up to transport him to the
9 station for booking. At that time, while wearing
10 -- while shod, the defendant kicked Officer
11 Killian in the face with that shoe.

12 At the time of the alleged offenses,
13 Mr. Dykens had been previously convicted of a
14 number of serious crimes, including breaking and
15 entering a dwelling in the night time, for which
16 he was sentenced on November 28, 1989 to a term
17 of nine to twenty years in the State prison by
18 the Middlesex Superior Court and for armed
19 burglary, for which he was sentenced to the term
20 of nine to fifteen years by the Middlesex
21 Superior Court on July 19, 1994.

22 At trial, the Commonwealth would
23 introduce records certified by the Keeper of
24 Records from the Massachusetts State Prison

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1 System, as well as certified copies of the prior
2 convictions from the Middlesex Superior Court in
3 order to show that this was the same Kenneth
4 Dykens who had been previously imprisoned on
5 those charges.

6 That is the substance of the
7 Commonwealth's case, Your Honor.

8 THE COURT: Thank you.

9 Mr. Dykens, did you hear the statement
10 or summary of the evidence made at this time by
11 Mr. Solet?

12 MR. DYKENS: Yes, sir.

13 THE COURT: And do you understand what
14 he was saying?

15 MR. DYKENS: Yes, sir.

16 THE COURT: Did you, in fact, do the
17 things he has described you as doing on the
18 evening of February 10, 2005 in Malden,
19 Massachusetts?

20 MR. DYKENS: Yes.

21 THE COURT: And are you the same
22 individual who on two prior occasions has been
23 convicted of breaking and entering a dwelling in
24 the night time, Middlesex Superior Court on

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CERTIFICATE OF SERVICE

I, Timothy St. Lawrence, counsel for the defendant herein, hereby certify that I served two copies of the foregoing "Motion to Vacate" and supporting "Memorandum of Law," by mail, first-class postage prepaid, on October 11, 2013, to the Office of the District Attorney for Middlesex County, 15 Commonwealth Avenue, Woburn, MA 01801.

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
No. 05-393

COMMONWEALTH

v.

KENNETH DYKENS

COMMONWEALTH'S OPPOSITION TO DEFENDANT'S "MOTION TO VACATE"

INTRODUCTION

The Commonwealth opposes the defendant's "Motion to Vacate." In 2005, the defendant pleaded guilty to a litany of charges arising out of the attempted burglary of a Malden home while the residents slept upstairs. Now, nearly ten years later, the defendant wishes to withdraw those pleas, claiming that some of the charges were duplicative and that one of the indictments "failed to state a crime." By pleading guilty, the defendant waived his right to raise these claims, which in any case have no merit. For the reasons advanced below, the defendant's motion should be denied without a hearing.

PROCEDURAL BACKGROUND

On March 31, 2005, a Middlesex County grand jury returned seventeen indictments charging the defendant, Kenneth Dykens, with attempt to commit unarmed burglary (three counts), assault with intent to maim, assault and battery with a dangerous weapon (shod foot), possession of a burglarious instrument (a rock), malicious destruction of property with a value over two hundred fifty dollars, assault and battery on a public employee (two counts), resisting arrest, and being a habitual offender (seven counts)

(MICR05-393). (Docket, attached as Exhibit A, pp. 5, 13.) The defendant was arraigned on April 20, 2005, and pleaded not guilty to all charges. (Exhibit A, p. 5.) On June 2, 2005, the defendant filed a motion to dismiss eight of the seventeen indictments; as to counts 003 and 005 charging attempted unarmed burglary, the defendant argued that they were duplicative of count 001. (Exhibit A, p. 6; Motion to Dismiss, attached as Exhibit B.) The Commonwealth filed a memorandum in opposition on July 20, 2005. (Commonwealth's Response, attached as Exhibit C.¹) In a memorandum and order dated September 6, 2005, Justice Peter M. Lauriat denied the motion as to counts 003 and 005 (as well as the corresponding habitual offender counts 004 and 006).² (Exhibit A, p. 6; Defendant's A.3-4, 6.)

On October 17, 2005, the defendant pleaded guilty to counts 001 (attempted unarmed burglary), 002 (habitual offender), 003 (attempted unarmed burglary), 005 (attempted unarmed burglary), 007 (assault with intent to maim), 009 (assault and battery with a dangerous weapon), 011 (possession of burglarious implement), 015 (assault and battery on public employee), 016 (assault and battery on public employee), and 017 (resisting arrest). (Exhibit A, pp. 6-8, 13.) The Commonwealth entered notices of nolle prosequi as to counts 004, 006, 010, 008, 010, and 012, the remaining habitual offender charges. (Exhibit A, pp. 6-7, 13.) After colloquy, Justice Lauriat accepted the defend-

¹ Because the defendant's motion in part addressed the evidence before the grand jury, the trial prosecutor attached the grand jury minutes to his response. Because they are not relevant to the instant motion, the grand jury minutes have not been included here.

² In the same motion, the defendant also requested dismissal of counts 009 (charging assault and battery with a dangerous weapon) and 013 (charging malicious destruction of property with a value over \$250) and their attendant habitual offender charges (010 and 014), arguing that the evidence before the grand jury was insufficient to support those indictments. Justice Lauriat denied the motion as to counts 009-010 and allowed it as to counts 013 and 014. (Exhibit A, p. 6; Defendant's A.1, 4-6.)

ant's pleas and imposed sentence. (Exhibit A, pp. 7-8.) On the conviction of assault with intent to maim (count 007), Justice Lauriat sentenced the defendant to a term of from seven years to seven years and one day in state prison; on one conviction of attempted armed burglary as habitual offender (counts 001 and 002), Justice Lauriat sentenced him to concurrent five-year sentences, to run concurrent with the sentence on count 007. (Exhibit A, p. 7.) On the remaining convictions (counts 003, 005, 009, 011, 015, 016, and 017), Justice Lauriat imposed concurrent five-year terms of probation, to be served from and after the committed sentences, with terms including 1) stay away from the victim; 2) random urine screens; 3) weekly reporting to the Probation Department, 4) integration into the community; and 5) \$65 probation fee or community service. (Exhibit A, p. 7.)

Almost immediately after this disposition, the defendant began a series of attempts to challenge either his plea or his sentence. On October 20, 2005, three days after sentence was imposed, the defendant filed a motion to revise or revoke the sentence; however, he did not request immediate action, and none was taken. (Exhibit A, p. 8.) On November 2, 2005, the defendant sent a letter to the court regarding "rescinding guilty plea." (Exhibit A, p. 8.) In response, Justice Lauriat ordered production of a transcript of the plea colloquy and requested a response from the Commonwealth. (Exhibit A, p. 8.) The defendant then filed another motion to revise and revoke his sentence on July 9, 2007; after a hearing on January 29, 2008, Justice Lauriat denied the motion. (Exhibit A, pp. 9-10.)

On June 19, 2012, after a hearing before Justice Maureen B. Hogan, the defendant was found to be in violation of his probation. (Exhibit A, p. 11.) The matter was con-

tinued, and the defendant defaulted. (Exhibit A, p. 11.) The default was removed on August 23, 2012. (Exhibit A, p. 11.) Eventually, on March 22, 2013, Justice Lauriat sentenced the defendant on count 009 (assault and battery with a dangerous weapon) to two years in the house of correction and on count 011 (possession of burglarious implement) to two years in the house of correction, from and after the expiration of the first sentence. (Exhibit A, p. 12; Clerk's notes of surrender hearing, attached as Exhibit D.) Justice Lauriat terminated the defendant's probation as to the remaining convictions. (Exhibit A, p. 12.)

On October 11, 2013, the defendant filed the instant "Motion to Vacate."

STATEMENT OF FACTS

In the early morning hours of February 10, 2005, John and Jacqui Cram³ were at their home in Malden. (Defendant's A.8.) They heard the sound of breaking glass and saw a figure moving around on their property. (Defendant's A.8.) A ladder that had been lying flat on the ground behind the house had been moved to a standing position under a second story window. (Defendant's A.8-9.) The Crams called 911, and Malden Police Officers Robert Selfridge and Ryan Killion, both in uniform, responded to the home. (Defendant's A.8, 11.) When they arrived, the police officers noticed that a screen had been torn off a first floor window and that a sliding glass door at the back of the house had been smashed. (Defendant's A.9.) Near that door was a large rock, which had not been there earlier; it appeared to be the instrument with which the glass had been broken. (Defendant's A.9.)

³ A number of names appear to be misspelled in the plea colloquy transcript. This memorandum follows the spellings used in other filings by the Commonwealth.

There were fresh footprints in the snow, the positioning of which suggested that they had been made by a person trying to force the rear door open. (Defendant's A.9.) Officer Selfridge followed the footprints through neighboring streets and yards and over a chain link fence, eventually discovering the defendant hiding in a rocky area. (Defendant's A.9.) When he ordered the defendant not to move, the defendant said, "I fucking did it, so just shoot me." (Defendant's A.9.) The defendant first tried to escape by climbing up a rock ledge, then came at the officer, despite the officer's attempt to spray him with OC spray. (Defendant's A.10.) The defendant tackled the officer, and the two rolled down a rocky hill with the defendant punching the officer in the face and head, grabbing his mouth, and gouging at his eye. (Defendant's A.10.) Officer Selfridge called for help, and Officer Killion came to try to help. (Defendant's A.10.) The defendant punched and kicked at the officers as they tried to subdue him. (Defendant's A.10.) Finally they managed to handcuff him, but while they were trying to stand him up in order to take him to the police station, he kicked Officer Killion in the face with a shod foot. (Defendant's A.11.)

At the time of his arrest, the defendant had been convicted of a number of serious crimes including breaking and entering a dwelling in the night time and armed burglary. (Defendant's A.11.)

ARGUMENT

A postsentence motion to withdraw a guilty plea is treated as a motion for new trial pursuant to Mass. R. Crim. P. 30 (b). Commonwealth v. Fanelli, 412 Mass. 497, 504 (1992). The defendant has the burden to show that justice was not done when he pleaded guilty. Mass. R. Crim. P. 30 (b). See Commonwealth v. DeMarco, 387 Mass. 481, 486-

487 (1982). A judge should grant a postsentence motion to withdraw a plea only if the defendant “comes forward with a credible reason which outweighs the risk of prejudice to the Commonwealth.” Id. at 486. The defendant has made no such showing in this case.

I. The defendant’s lengthy delay in bringing his motion casts doubt on any claim that justice was not done and also prejudices the Commonwealth.

The defendant pleaded guilty in 2005. At his plea colloquy, he acknowledged that he was waiving his right to challenge on appeal any rulings of this Court on his pre-trial motions – including the motion to dismiss based on supposedly duplicative indictments. (Defendant’s A.7.) Now, having violated his probation and been sentenced on the conviction of assault and battery with a dangerous weapon, he complains that the ruling on that motion to dismiss was erroneous and also that a third indictment was supposedly defective (and that if it was not defective it was duplicative of other indictments to which he pleaded). This claim fails, and the defendant’s motion should be denied.

The defendant has offered no reason, much less a plausible reason, for having waited more than eight years to move to withdraw his pleas. Cf. Lopez, 426 Mass. at 662-663 (where motion to withdraw pleas was clearly motivated by possibility of enhanced Federal sentence, delay of ten to nineteen years between pleas and motion to withdraw suggests allegations of irregularities in plea proceedings not credible). The defendant, having filed a motion to dismiss based in part on the allegedly duplicative character of the three indictments for attempted unarmed burglary, cannot claim to have been unaware of the issue. He had the opportunity to go to trial (even on stipulated facts) and challenge the judge’s ruling on appeal; he did not do so. He could have filed a motion to

withdraw the pleas on this basis eight years ago; he did not do so. He has offered no explanation for his failure to move to withdraw his pleas until after he violated probation and was sentenced to further committed time.⁴ The fact that a defendant waits many years before moving to withdraw a guilty plea is “an indicium of satisfaction with the plea agreement.” Commonwealth v. Hoyle, 67 Mass. App. Ct. 10, 13 (2006).

Relying on Commonwealth v. Negron, 462 Mass. 102, 108 (2012), the defendant argues that he has not waived his claim by pleading guilty. (Defendant’s memorandum, p. 6.) See Negron, 462 Mass. at 108. The court in Negron, however, made clear that its holding applied only to “charges that on their face are duplicative.” Id. Here, the indictments on counts 001, 003 and 005 are not duplicative on their face, since they charge separate and distinct acts. (Indictments, attached as Exhibit E.) Therefore, Negron does not apply in this case. In any event, the “important policy of finality,” Commonwealth v. Lopez, 426 Mass. 657, 657 (1998), would be undermined by allowing the defendant to withdraw his pleas. Should a trial be necessary, the Commonwealth would be significantly prejudiced by the lapse of more than eight years: even if the victims of the defendant’s crimes can be located and are willing to testify, memories will have faded, other witnesses may be unavailable, and evidence will have been lost or destroyed. See Commonwealth v. Pingaro, 44 Mass. App. Ct. 41, 54 (1997). The defendant simply has failed to meet his burden of coming forward with a “credible reason”—either for invalidating

⁴ The Commonwealth notes that the defendant was sentenced on the conviction of assault and battery with a dangerous weapon, and that at the final surrender hearing his probation was terminated. (Exhibit A, p. 12.) Since the defendant has been discharged and faces no further punishment for the convictions he now challenges, it is not at all clear what, if anything, allowance of the instant motion would accomplish.

his pleas or for his delay in making that request—that outweighs the risk of prejudice to the Commonwealth and the public interest. Lopez, 426 Mass. at 662.

II. Where each indictment charged a separate and distinct attempted breaking and entering of the victims' home, the three indictments for attempted unarmed burglary were not duplicative.

The defendant first claims that the three indictments for unarmed burglary were duplicative. (Defendant's memorandum, pp. 4-6.) This claim fails. Where the indictments charged three separate acts constituting separate attempts at breaking and entering the victims' home, the motion judge properly found that the indictments could stand.

The defendant argues that the three separate attempts to enter the home were part of a "continuous stream of conduct." (Defendant's memorandum, p. 5.) However, where the defendant was charged not with burglary but with attempted burglary, each act constituted a separate attempt and thus could be charged separately. The indictments did not charge the defendant with, for example, separate acts of preparation or other steps taken toward a single attempt, but rather with three separate and distinct – and unsuccessful – assaults on the building. As the Commonwealth argued in its opposition to the defendant's motion to dismiss, "the narrative in the instant case is of attempt and failure, attempt and failure, attempt and failure. Each charge has a separate and distinct nature, a separate overt act, and each was frustrated prior to the commission of the next." (Exhibit C, p. 4.)

The defendant takes issue with the motion judge's conclusion that the singular "any act" in the attempt statute permitted separate charges for each act in this case. (Defendant's memorandum, pp. 4-5.) This argument, too, is unavailing. The defendant relies on G.L. c. 4, § 6, which provides in part that "[w]ords importing the singular number may extend and be applied to several persons or things." The defendant then seeks to

change the “may” in the statute into “must,” thereby erasing any distinction between singular and plural. The statute, however, only provides that a singular word “may” encompass a plural. As the motion judge concluded, there was no reason to do so here. The motion judge correctly found that the plain meaning of “any act” meant that each attempt in this case could be the subject of a separate indictment.

Nor does this interpretation of the attempt statute as it applies to this case lead to an absurd or unjust result as the defendant argues. (Defendant’s memorandum, p. 6.) Where, as here, the evidence shows that the defendant tried and failed in three separate and distinct ways to break into the victims’ home, separate punishment for each attempt is warranted. This is not a case where a single act caused offense or injury to more than one person. Contrast Commonwealth v. Botev, 79 Mass. App. Ct. 281, 287-289 (2011) (charges of open and gross lewdness duplicative where defendant made single exposure of his genitals to two girls simultaneously, noting that allowing two charges could lead to “unreasonable result” in which hypothetical defendant who ran onto field at Fenway Park and exposed himself could be subject to 37,000 counts of open and gross lewdness). This is a case of three separate attempts to break and enter. See Commonwealth v. Cotto, 52 Mass. App. Ct. 225, 227 (2001) (“[b]urglary is an offense against property”). The Legislature surely did not intend to reward persistence of this kind; the fact that the defendant continued to try new (and apparently increasingly dangerous and destructive) methods could logically be the basis of increased punishment. The convictions are not duplicative.

III. The indictment for possession of a burglarious instrument sufficiently stated a crime; therefore, any defect was not jurisdictional, and the defendant's challenge is waived.

The defendant next complains that count 011, charging possession of a burglarious instrument (a rock), "should be vacated and dismissed because that indictment failed to state a crime." (Defendant's memorandum, pp. 7-8.) The defendant did not move to dismiss this indictment before entering his plea. The claim, which is waived both by virtue of the failure to raise it before trial and by virtue of the defendant's having pleaded guilty to that indictment, has no merit in any case.

By pleading guilty, the defendant admitted not only that the facts recited by the Commonwealth were accurate but also that those facts constituted a violation of the relevant statute. See, e.g., Negron, 462 Mass. at 105 (guilty plea is "admission of facts charged" and "is itself a conviction"); Commonwealth v. Buckley, 76 Mass. App. Ct. 123, 128 (2010) (guilty plea "comprehend[s] all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence"). That there might be a factual question whether a rock constitutes a burglarious implement is irrelevant; by pleading guilty, the defendant agreed that it qualified in this case and that all the other elements of the offense were satisfied. The defendant does not now claim that his attorney rendered ineffective assistance in advising him to plead to this charge; nor has he provided an affidavit from that attorney (who is still practicing in the area) to explain how he arrived at the decision to advise the defendant to plead guilty. Cf. Commonwealth v. Bowler, 60 Mass. App. Ct. 209, 213 (2003) (motion to withdraw plea "conspicuously marred" by absence of affidavit from trial counsel).

The defendant fares no better with his argument that the alleged defect in indictment 011 deprived this Court of jurisdiction over the defendant because it “failed to state a crime.” (Defendant’s memorandum, pp. 7-8.) The defendant misapprehends the meaning of “jurisdictional” in relation to an error in the form of an indictment. A defect in an indictment deprives the court of jurisdiction only if, as a result of the error, the indictment on its face “fails to state a crime.” Commonwealth v. Cantres, 405 Mass. 238, 239-240 (1989) (indictment valid where it charged conspiracy to violate controlled substances act but did not specify the violation that was the object of the conspiracy). See also Commonwealth v. Palladino, 358 Mass. 28, 29-31 (1970) (defect in indictment that failed to allege scienter element of offense was jurisdictional); Commonwealth v. Bracy, 313 Mass. 121, 124 (1943) (defect is jurisdictional where jury “proceeded to find the defendant guilty of something that did not constitute crime”).

In Commonwealth v. Wilson, 72 Mass. App. Ct. 416 (2008), the defendant was charged with assault and battery by means of a dangerous weapon in connection with a motor vehicle crash involving a police cruiser. Wilson, 72 Mass. App. Ct. at 416. The indictment charged that the defendant “did, by means of a dangerous weapon, MOTOR VEHICLE, assault and beat COMM OF MASS, in violation of G.L. c. 265, § 15A,” but did not specify a human victim. Id. The Appeals Court held that the defect was jurisdictional, and the indictment was void, because “a human victim is a material element of the offense. . . There is no crime of assault and battery against the Commonwealth of Massachusetts.” Id. at 417-418. Contrast Commonwealth v. Lengsavat, 49 Mass. App. Ct. 243, 245 n.5 (2000) (indictment charging assault by means of a dangerous weapon sufficiently charged offense where victims were unnamed “occupants” of building near which

defendant fired shots in the air). Here, by contrast, the challenged indictment set forth in substance all the elements of the charged offense: that the defendant 1) knowingly had in his possession a tool or implement, specifically a rock; 2) that the tool or implement reasonably could be used to break into a building; 3) that he knew the implement could reasonably be used for that purpose; 4) that he intended so to use it; and 5) that he had the specific intention of using the tool to steal or commit a crime in that place. (Exhibit E.) See Model Jury Instructions for Use in the District Courts 8.180 (2009). Whether a rock could qualify in this case as a tool or implement “adapted and designed for cutting through, forcing or breaking open a building,” G.L. c. 266, § 49, is a question of fact that could have been placed before a jury. The fact that this might be a debatable issue did not deprive this Court of jurisdiction to try the defendant on this charge, or to accept his plea of guilty (whereby he agreed that a rock was such a tool or implement).

Furthermore, the defendant errs in claiming that a rock cannot qualify as a burglarious implement under G.L. c. 266, § 49. Massachusetts courts have found that an ordinary tool may be a burglarious implement so long as an intent to use it for burglarious purposes “appear[s] clearly from the circumstances” in which it is found. Commonwealth v. Porter, 70 Mass. App. Ct. 901, 902 (2007), quoting Commonwealth v. Dellinger, 10 Mass. App. Ct. 549, 561 (1980). See also Commonwealth v. Aleo, 18 Mass. App. Ct. 916, 916 (1984) (screwdrivers and dent puller qualify as burglarious implements where evidence supports inference that defendants intended to use them to steal radios from cars); Commonwealth v. Dreyer, 18 Mass. App. 562, 564-565 (1984) (screwdriver is burglarious tool where defendant possessed it while hiding in nearly-empty parking lot at three o’clock in the morning and fled when approached by police).

Our cases do not require that a tool have been somehow altered to make it “burglarious,” as the defendant’s argument implies. In any event, it is possible that the rock in question had been altered in some way to make it more efficacious in smashing windows; because the defendant chose not to go to trial, it is not possible to know. There was no risk of a miscarriage of justice. The defendant’s motion should be denied as to this charge.

IV. Since possession of burglarious implements and attempted unarmed burglary are distinct offenses with different elements, the convictions are not duplicative.

Finally, the defendant argues that even if the indictment for possession of burglarious implements was not fatally defective, that conviction should nevertheless be vacated because it is duplicative of the conviction on count 001 of attempted unarmed burglary. (Defendant’s memorandum, pp. 9-10.) This argument, too, is meritless.

This case is controlled in all material respects by Commonwealth v. Vick, 454 Mass. 418, 430-436 (2009). In Vick, the Supreme Judicial Court reiterated the “traditional rule in Massachusetts, as embodied in Morey v. Commonwealth, 108 Mass. 433, 434 (1871) (Morey) and its progeny, . . . that ‘a defendant may properly be punished for two crimes arising out of the same course of conduct provided that each crime requires proof of an element that the other does not.’” Vick, 454 Mass. at 431. The court in Vick repudiated an apparent expansion of the elements-based analysis to encompass a “same conduct” test, holding that the “same conduct” test was applicable only where one crime was a lesser included offense of another. Id. at 433-435. See also Commonwealth v. Muller, 461 Mass. 1009, 1010 (2012) (court will “adhere” to elements-based approach and “reject” conduct-based approach).

The elements of attempted unarmed burglary are that the defendant broke into and entered a dwelling house in the night time, and that he did so with the intent to commit a felony. Commonwealth v. Willard, 53 Mass. App. Ct. 650, 653 (2002). As set forth above (see p. 12, supra), the elements of possession of burglarious implements are that the defendant 1) knowingly had in his possession a tool or implement, specifically a rock; 2) that the tool or implement reasonably could be used to break into a building; 3) that he knew the implement could reasonably be used for that purpose; 4) that he intended so to use it; and 5) that he had the specific intention of using the tool to steal or commit a crime in that place. G.L. c. 266, § 49. The offenses have no element in common besides a general nefarious intent (which is nonetheless different in each offense, unarmed burglary requiring intent to commit a felony inside the building, possession of burglarious implements requiring a specific intent to use the implement to commit a crime). Therefore, the convictions cannot be duplicative. Commonwealth v. Cabrera, 449 Mass. 825, 827-828 (2007) (convictions of breaking and entering in the night time with intent to commit a felony and receiving stolen property not duplicative; where offenses contain no elements in common, “[i]t is the prerogative of the Legislature, in the course of defining offenses and fixing punishments, and in furtherance of public policy goals, to punish related offenses separately”).

The defendant’s reliance on Commonwealth v. Santos, 440 Mass. 281, 293 (2003) (Defendant’s Memorandum, p. 9), is misplaced. Santos is no longer good law in the Commonwealth. Commonwealth v. Anderson, 461 Mass. 616, 632-634 (2012) (overruling Santos and affirming elements-based approach).

V. No hearing is warranted where the defendant has not raised any "substantial issue" warranting withdrawal of his plea.

The decision to grant a hearing on a Rule 30 (b) motion is entrusted to the sound discretion of the motion judge. Commonwealth v. Gagliardi, 418 Mass. 562, 572 (1994), cert. denied, 513 U.S. 1091 (1995). A judge may rule on the issues presented in the motion without further hearing "if no substantial issue is raised by the motions or affidavits." Id. In deciding whether a defendant has raised a "substantial issue," a judge should "look not only at the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." Id., quoting Commonwealth v. Stewart, 383 Mass. 253, 257-258 (1981).

As the above discussion has shown, the defendant has neither made an adequate evidentiary showing nor raised any substantial issue. He has not given any legally sufficient reason why his plea, which has stood for nearly ten years, should now be withdrawn. No hearing is required.

CONCLUSION

For the foregoing reasons, the defendant's "Motion to Vacate" should be denied without a hearing.

Respectfully submitted
For the Commonwealth,

MARIAN T. RYAN
DISTRICT ATTORNEY

by: 
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Dated: August 18, 2014

**Commonwealth of Massachusetts
MIDDLESEX SUPERIOR COURT
Case Summary
Criminal Docket**

Commonwealth v Dykens, Kenneth

Details for Docket: MICR2005-00393

Case Information

Docket Number:	MICR2005-00393	Caption:	Commonwealth v Dykens, Kenneth
Entry Date:	03/31/2005	Case Status:	Crim 2 Ct Rm 530
Status Date:	04/11/2013	Session:	Closed (defendant discharged)
Lead Case:	NA	Deadline Status:	Active since
Trial Deadline:	06/15/2005	Jury Trial:	NO

Parties Involved

2 Parties Involved in Docket: MICR2005-00393

Party Involved:		Role:	Defendant
Last Name:	Dykens	First Name:	Kenneth
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Party Involved:		Role:	Plaintiff
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Attorneys Involved

9 Attorneys Involved for Docket: MICR2005-00393

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Calendar Events

33 Calendar Events for Docket: MICR2005-00393

No.	Event Date:	Event Time:	Calendar Event:	SES:	Event Status:
1	04/20/2005	09:00	Arraignment	1	Event held as scheduled
2	05/17/2005	14:00	Bail: Review	5	Event not held--joint request
3	06/08/2005	14:00	Bail: 58A Review	5	Event held as scheduled
4	06/29/2005	14:00	Hearing: Evidentiary-dismiss	5	Event not held--joint request
5	07/20/2005	14:00	Hearing: Evidentiary-dismiss	5	Event held--(ACTIVE) under advisement
6	08/17/2005	14:00	Hearing: Non-eviden-Discovery	5	Event held as scheduled
7	09/07/2005	08:30	Status: Filing deadline	5	Event held as scheduled
8	09/14/2005	08:30	Hearing: Evidentiary-suppression	5	Event canceled not re-scheduled
9	10/17/2005	08:30	Hearing: Plea Change	5	Event held as scheduled
10	10/31/2005	08:30	TRIAL: by jury	5	Event canceled not re-scheduled
11	11/30/2005	14:00	Hearing: Motion	5	Event canceled not re-scheduled
12	01/05/2006	14:00	Hearing: Motion	5	Commonwealth did not appear
13	02/03/2006	09:00	Hearing: Motion	5	Event not held--req of Defendant
14	03/13/2006	14:00	Hearing: Motion	5	Event not held--joint request
15	04/11/2006	14:00	Hearing: Motion	5	Event held as scheduled
16	05/09/2006	14:00	Status: Administrative Review	5	Event held as scheduled
17	12/12/2007	14:00	Hearing: Sentence Revise/Revoke	5	Event not held--req of Defendant
18	01/29/2008	15:00	Hearing: Sentence Revise/Revoke	5	Event held as scheduled
19	06/07/2012	09:00	Hearing: Appointment Counsel	CM	Defendant did not appear/default
20	06/07/2012	09:00	Hearing: Warrant Removal	CM	Event held as scheduled
21	06/19/2012	14:00	Hearing: Probation Surrender	2	Event held as scheduled
22	07/23/2012	08:30	Hearing: Capias	CM	Event held as scheduled
23	08/14/2012	09:00	Hearing: Appointment Counsel	CM	Event not reached by Court
24	08/16/2012	09:00	Hearing: Appointment Counsel	CM	Event not reached by Court
25	08/23/2012	09:00	Hearing: Appointment Counsel	CM	Event held as scheduled
26	10/25/2012	14:00	Hearing: Probation Surrender	2	Event not reached by Court
27	11/29/2012	14:00	Hearing: Probation Surrender	2	Event rescheduled by court prior to date
28	01/24/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event not held--req of Probation
29	01/25/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event not held--req of Probation

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30	02/15/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event held as scheduled
31	03/12/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event held as scheduled
32	03/22/2013	14:00	Hearing: Probation Evidentiary Final Hrg	2	Event held as scheduled
33	08/18/2014	16:00	Status: Review by Clerk	2	

Full Docket Entries

325 Docket Entries for Docket: MICR2005-00393

Entry Date:	Paper No:	Docket Entry:
03/31/2005	1	Indictment returned
03/31/2005		Assigned to Track "A", see scheduling order
04/06/2005		Habeas corpus for Deft at Cambridge Jail for 4/20/05
04/20/2005		Deft arraigned before Court
04/20/2005		RE Offense 1:Plea of not guilty
04/20/2005		RE Offense 2:Plea of not guilty
04/20/2005		RE Offense 3:Plea of not guilty
04/20/2005		RE Offense 4:Plea of not guilty
04/20/2005		RE Offense 5:Plea of not guilty
04/20/2005		RE Offense 6:Plea of not guilty
04/20/2005		RE Offense 7:Plea of not guilty
04/20/2005		RE Offense 8:Plea of not guilty
04/20/2005		RE Offense 9:Plea of not guilty
04/20/2005		RE Offense 10:Plea of not guilty
04/20/2005		RE Offense 11:Plea of not guilty
04/20/2005		RE Offense 12:Plea of not guilty
04/20/2005		RE Offense 13:Plea of not guilty
04/20/2005		RE Offense 14:Plea of not guilty
04/20/2005		RE Offense 15:Plea of not guilty
04/20/2005		RE Offense 16:Plea of not guilty
04/20/2005		RE Offense 17:Plea of not guilty
04/20/2005		Deft arraigned before Court
04/20/2005		Bail set: \$10,000 cash WOP Cash
04/20/2005		Mittimus issued
04/20/2005		Bail warning read
04/20/2005		Defendant present in court, continued until May 17, 2005 at 2pm in
04/20/2005		courtroom 10B for PTC
04/20/2005		Reporter present: Beers, Lorraine
04/20/2005		Appearance of Deft's Atty: Mark Wester

04/20/2005		Appearance of Commonwealth's Atty: David Marc Solet
04/20/2005	2	Affidavit of indigency filed; approved (Pasquale,CM)
04/20/2005	3	Statement of appointment, Mark Wester appointed as Counsel for
04/20/2005	3	defendant from the Court list successive order (no further
04/20/2005	3	explanation required) Pasquale, CM
04/20/2005	4	Order assessing statutory fee for appointment of counsel
04/20/2005	5	Commonwealth files commonwealth's statement of the case
04/20/2005	6	Commonwealth files compliance with M.R.C.P. Rule 14 Discovery I
04/20/2005	7	Notice of assignment of counsel filed.
04/21/2005		Habeas corpus for Deft at Old Colony Correctional Center
04/21/2005		(Bridgewater)for 5/17/05 Bail Review
05/17/2005	8	Tracking order (Lauriat,J.) see calendar for events (copies mailed)
06/01/2005	9	Commonwealth files compliance with M.R.C.P. Rule 14 Discovery II
06/02/2005	10	Motion by Deft: To Dismiss Counts 3-6, 9-10, 13-14 Of The Indictment
06/02/2005	10	With Memorandum Of Law And Affidavit In Support Of Motion. (Sent to
06/02/2005	10	Lauriat, J.) +
07/12/2005		Habeas corpus for Deft at Old Colony for 7/20/05
07/13/2005	11	Letter from defendant re: request for suspended sentence (copy to ADA
07/13/2005	11	and Deft's atty.)
07/18/2005	12	Commonwealth files Compliance with M.R.C.P. Rule 14 Discovery III
07/20/2005		Hearing on (P#10) held held, matter taken under advisement (Lauriat,J
07/20/2005		7/20/05)
07/21/2005		Habeas corpus for Deft at Cambridge for 8/17/05
07/22/2005	13	Motion by Deft: For Discovery
08/18/2005		See Order in Margin. Motion Page # 13 -1,2,3 & 5 Agreed Requested
08/18/2005		form Police Dept. 4 & 5 Not in Possession of Commonwealth if to be
08/18/2005		offered in accordance, provide by)ct.17/05 to Deft's Counsel. (Peter
08/18/2005		M. Lauriat, Justice))
08/18/2005		Habeas corpus for Deft at Cambridge Jail for 9/14/05
09/06/2005		RE Offense 13:Dismissed
09/06/2005		RE Offense 14:Dismissed
09/07/2005	14	ORDERED: Re: Motion (P# 10) For the Foregoing reasons, the
09/07/2005	14	defendant's Motion to Dismiss is Denied as to indictments
09/07/2005	14	003,004,005,006,009 and 010, and Allowed as to Indictments 013 & 014.
09/07/2005	14	Copies sent to both sides (Peter M. Lauriat, Justice)
09/08/2005	15	Commonwealth files compliance with m.r.c.p. rule 14 discovery IV
09/08/2005	17	Commonwealth files compliance with M.R.C.P. Rule 14 Discovery V
09/12/2005	16	Letter from defendant to (Lauriat, J.)
09/14/2005		Habeas corpus for Deft at Old Colony on October 17, 2005 at 9am in
09/14/2005		ctrm. 10B
10/17/2005	19	Waiver of defendants' rights(copy to Joyce Coleman,CPO)
10/17/2005	18	Commonwealth files Partial Nolle Prosequi #'s 004,006,010,012

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10/17/2005		Plea of not guilty changed to guilty; accepted by the court
10/17/2005		,Commonwealth moves for sentence
10/17/2005		RE Offense 1:Guilty plea
10/17/2005		RE Offense 2:Guilty plea
10/17/2005		RE Offense 3:Guilty plea
10/17/2005		RE Offense 4:Nolle prosequi
10/17/2005		RE Offense 5:Guilty plea
10/17/2005		RE Offense 6:Nolle prosequi
10/17/2005		RE Offense 8:Nolle prosequi
10/17/2005		RE Offense 9:Guilty plea
10/17/2005		RE Offense 10:Nolle prosequi
10/17/2005		RE Offense 11:Guilty plea
10/17/2005		RE Offense 12:Nolle prosequi
10/17/2005		RE Offense 15:Guilty plea
10/17/2005		RE Offense 16:Guilty plea
10/17/2005		RE Offense 17:Guilty plea
10/17/2005		002 Defendant sentenced to Cedar Junction for a term of 5
10/17/2005		years,sentence to run concurrent with 2005-393-007
10/17/2005		007 Defendant sentenced to Cedar Junction for a term not exceeding 7
10/17/2005		years and 1 day or less than 7 years (Lauriat,J.)
10/17/2005		001 see 002 for general sentence, Defendant sentenced to Cedar
10/17/2005		Junction for a term of 5 years sentence to run concurrent with
10/17/2005		2005-393-007
10/17/2005		003 Defendant is placed on Probation for a period of 5 years from
10/17/2005		and after committed sentence 2005-393-007 with the following
10/17/2005		conditions 1) stay away from victim both direct and indirect 2)
10/17/2005		under-go random urine screens 3) weekly reporting to Probation Dept.
10/17/2005		4) intergration into Community thru direction of Probation Dept. 5)
10/17/2005		65.00 Probation Sup. fee is imposed or in lieu of community service
10/17/2005		005,009,011,015,016,017 Defendant is placed on Probation for a period
10/17/2005		of 5 years to run concurrent with 2005-393-003 and from and after
10/17/2005		2005-393-007,see 003 for conditions
10/17/2005		Sentence credit given as per 279:33A: 253 days credit on mittimus
10/17/2005		Mittimus issued to Cedar Junction 007 ,002
10/17/2005		Defendant warned per Chapter 278, Sec 29D of alien status
10/17/2005		Notified of right of appeal under Rule 64
10/17/2005		Attested copy on indictments sent to Cedar Junction records dept.
10/17/2005		#007,001,002
10/17/2005	20	Order on statutory fees (Lauriat,J.)
10/17/2005		Victim-witness fee assessed: \$90.00
10/17/2005		Probation supervision fee assessed: \$65.00 or Community service
10/17/2005		alternative

10/17/2005		Mittimus returned w/o service
10/17/2005		RE Offense 7:Guilty plea
10/20/2005	21	Defendant files motion to revise and revoke sentence with an
10/20/2005	21	Affidavit in Support of Motion (no action requested at this time)
10/20/2005	21	(sent to Judge Lauriat)
10/25/2005		Motion (P#21) No action taken at present time at defendant's request.
10/25/2005		(Peter Lauriat, Justice)
11/02/2005	22	Letter from defendant re: rescinding guilty plea (sent to counsel)
11/14/2005		Victim-witness fee paid as assessed 90.00
11/29/2005		Habeas corpus for Deft at MCI Cedar Junction for 11-30-2005
12/30/2005		Habeas corpus for Deft at Old Colony Corr. on Jan.5, 2005 at 9am in
12/30/2005		ctrm. 10B
01/05/2006	23	Letter received from Defendant and Upon Review and treated as a New
01/05/2006	23	Trial Motion, The Commonwealth is ORDERED to file is written response
01/05/2006	23	within 30 days of this date. Lauriat, J
01/05/2006		Defendant's letter (P#23) Upon review, and treated as a New Trial
01/05/2006		Motion, the Commonwealth is ordered to file its written response
01/05/2006		within 30 days of this date. (Lauriat, J.) notice sent
01/05/2006	24	ORDER: In connection with the court's consideration of the
01/05/2006	24	defendant's request to withdraw his guilty plea, which was tendered
01/05/2006	24	and accepted by the court on October 17, 2005, it is hereby ORDERED
01/05/2006	24	that a transcript be prepared of the defendant's guilty plea colloquy
01/05/2006	24	and sentencing hearing on that date, and that the original be filed
01/05/2006	24	with the court and copies be provided to the District Attorney's
01/05/2006	24	Office Department and the defendant. (Lauriat, J.) notice sent
01/09/2006	25	Court Reporter Hoben, Shawna is hereby notified to prepare one copy
01/09/2006	25	of the transcript of the evidence of October 17, 2005 Change of Plea
01/19/2006	26	Motion by Commonwealth: for extension of filing deadline filed in
01/19/2006	26	court
01/20/2006		Motion (P#26) Allowed (Lauriat,J)
01/30/2006		Habeas corpus for Deft at Old Colony on 2*3-2006
02/13/2006		Habeas corpus for Deft at Old Colony on 3-13-2006
02/13/2006	27	Re: letter from defendant
02/13/2006		Motion (P#27) The Middlesex County Sheriff's Office is requested to
02/13/2006		provide this court with a copy of all reports made or generated with
02/13/2006		respect to the incident which allegedly occurred in the Cambridge
02/13/2006		Jail on November30, 2005 concerning Kenneth Dykens,by or before
02/13/2006		February 28, 2006 (Lauriat,J)
02/27/2006	28	Mittimus returned with service
03/10/2006	29	Habe: returned wo/service
03/21/2006	30	Motion for appointment of new counsel (sent to ADA and Deft's Atty.)
04/04/2006		Habeas corpus for Deft at Old Colony for 4-11-2006

04/11/2006	31	Habe: returned w/service
04/12/2006		Habeas corpus for Deft at Old Colony fo 5-9-2006
04/18/2006		Transcript of testimony received One Volume of October 17, 2005 from
04/18/2006		Court Reporter Shawna Delia Hoban
05/09/2006	32	Motion by Deft: To Withdraw Guilty Plea With Affidavit
05/09/2006		Motion to be referred to CPCS screenign Committee for consideration
05/09/2006		of appointment of counsel.
05/09/2006	33	Motion To Withdraw As Counsel For Defendant With Affidavit In Support
05/09/2006		Motion (P#33) ALLOWED w/o objection of defendant (Peter M. Lauriat,
05/09/2006		Justice).
06/01/2006		Transcript of testimony received One Volume of October 17, 2005
06/01/2006		Change of Pleas from Court Reporter Shawma Hobam (To replaced
06/01/2006		previously filed transcript as that wa a draft only)
06/22/2006	34	Request - Letter Received from Defendant (Re: Disabilities)
06/22/2006		Regarding Request (P # 34) Upon review, the court takes no action on
06/22/2006		this request, since it is without Authority or Jurisdiction to do so.
06/22/2006		This is a matter which should be considered by way of a civil action
06/22/2006		against the Department of Correction (Peter M. Lauriat, Justice) copy
06/22/2006		sent to Defendant 06/23/06 MCI-Shirley, ADA & Deft's Atty.
06/13/2007	35	Notice of assignment of counsel filed.Richard Heartquist, Esq.
06/13/2007	35	C8005687-4
06/19/2007	36	Defendant files revised MOTION to revise and revoke sentence (Copy to
06/19/2007	36	Peter Lauriat, J)
07/09/2007		Motion (P#36) Revised Motion To Revise And Revoke Sentence-- The
07/09/2007		Commonwealth shall serve and file its written response to this motion
07/09/2007		by or before August 17, 2007, and forward a courtesy copy to the
07/09/2007		Court in Suffolk Superior Court (Room 1300). (Peter Lauriat, Justice)
07/09/2007		Both sides notified.
09/25/2007		Appearance of Commonwealth's Atty: Anne C. Pogue
09/25/2007	37	MOTION by Commonwealth: for Leave to File Late Opposition to
09/25/2007	37	Defendant's Motion to Revise and Revoke by or Before November 23,
09/25/2007	37	2007. (Copy to Lauriat, J)
10/31/2007	38	Commonwealth files Opposition to Defendant's Revised Motion to Revise
10/31/2007	38	and Revoke (copy to Lauriat, J)
01/29/2008	39	Clerks minutes of hearing held in Suffolk; Re Motion to Revise and
01/29/2008	39	Revoke Sentence Paper #36 : After hearing taken under advisement
01/29/2008	39	effective 02/11/2008 The court allows until Feb 4,2008 for the
01/29/2008	39	Defendantto submit supporting Legal Documentation and Medical
01/29/2008	39	documentation The court allows until 02/11/2008 for the Comm to file
01/29/2008	39	its response Upon reciept of Documentation the court willt ake the
01/29/2008	39	matter under advisement Lauriat Justice.
02/04/2008	39	MOTION by Commonwealth: Pursuant To Mass. R. Crim. P.42 To Correct

02/04/2008	39	The Docket Sheet
02/04/2008		MOTION (P#39.1 Allowed w/o objection) allowed (Lauriat, J.)
02/05/2008	40	Commonwealth Files Sur-Reply To Documents Recently Filed In Support
02/05/2008	40	Of Defendant's Revised Motion To Revise And Revoke
03/04/2008	41	Order On Defendant's Revised Motion To Revise And Revoke Sentence
03/04/2008	41	--ORDER-- For the forgoing reasons, the Defendant's Revised Motion To
03/04/2008	41	Revise and Revoke is DENIED. (Peter M. Lauriat, Justice)
08/11/2008	42	Treated as a motion to revise and revoke and DENIED. Post sentencing
08/11/2008	42	developments cannot be considered. As the defendant is represented by
08/11/2008	42	counsel, defendants pro se motion for an audiotape of the plea
08/11/2008	42	colloquy hearing is DENIED. Lauriat, Peter
11/06/2008	43	Letter from defendant sent to (Lauriat, J.)
11/24/2008		Appearance of Commonwealth's Atty: Hallie White Speight
12/08/2008	45	Motion (P#44) Treating this letter (paper #44) as a request to listen
12/08/2008	45	to court reporter's audiotape recording of the defendant's guilty
12/08/2008	45	plea colloquy in this case, the court will hold a hearing at 3:00pm
12/08/2008	45	on January 6, 2009, in Courtroom 704 of the Suffolk County Superior
12/08/2008	45	Court in Boston, at which time the court reporter will play the
12/08/2008	45	audiotape recording of Mr. Dykens' plea colloquy held in the
12/08/2008	45	Middlesex County Superior Court on October 17, 2005. Counsel of
12/08/2008	45	record for the Commonwealth and the defendant shall be notified and
12/08/2008	45	may attend. Mr. Dykens shall be habed in from MCI Shirley Medium, or
12/08/2008	45	from such other institution as may be housing him as of the date of
12/08/2008	45	the hearing. Peter M. Lauriat.
12/09/2008	44	Letter from defendant regarding audio tape. (Sent to (Lauriat, J.)
01/06/2009		Motion (P#44) In response to this letter the court held a hearing on
01/06/2009		this date at which court reporter Shawna Hoban played in court in the
01/06/2009		presence of Kenneth Dykens, the audio tape of his plea colloquy - No
01/06/2009		further action is required at this time. (Peter Lauriat, Justice)
02/11/2010	46	MOTION by Deft: For A Court Orde To Allow The Defendant To Be
02/11/2010	46	Transferred To The Department Of Mental Health Tewksbury Facility For
02/11/2010	46	Treatment Services With Memorandum Of Law
02/11/2010	47	MOTION by Deft: For A Writ Of Haeas Corpus
02/11/2010		Motion (P#46) Upon review, the court is without authority to compel
02/11/2010		or direct the transfer of a sentenced individual to a DMH facility
02/11/2010		prior to his release from incarceration. Mr. Dykens believes that
02/11/2010		such a tranfer is permissible or even possible, he should consider a
02/11/2010		civil action to require the DOC to do so. (Peter Lauriat, Justice)
07/14/2011		Corrected mittimus issued on 7/13/2011
01/11/2012		cert copies sent on 1/11/2012 to Steve Mulloy, Probation
06/07/2012	48	Clerk's Minutes Of Probation Hearing @ 9:30 a.m.; Matthew Day, First
06/07/2012	48	Asst.Clerk Magistrate; Appointment Of Counsel; Result: Warrant to

06/07/2012	48	Issue; Assistant Clerk Dennis F.Collins
06/07/2012	49	Clerk's Minutes Of Probation Hearing @ 10:45am; Michael
06/07/2012	49	A.Sullivan,Esq., Clerk Magistrate; Probation Officer Vanessa Banks;
06/07/2012	49	Defense Attorney: Sean Delaney (apptd); Appointment Of Counsel;
06/07/2012	49	Continued to June 19,2012 for Surrender in Rm 530 at 2pm; Result:
06/07/2012	49	Warrant expunged from the record. Personal recognizance; Assistant
06/07/2012	49	Clerk Dennis F.Collins
06/07/2012	50	Affidavit of indigency filed; APPROVED, Committee for Public Counsel
06/07/2012	50	Services appointed; receives food stamps; receives Supplementary
06/07/2012	50	Security Income (SSI). (Michael Sullivan, Clerk Magistrate)
06/07/2012	51	Notice of assignment of counsel filed. c50059682 Sean Delaney,Esq.
06/07/2012	51	(Dennis F.Collins, Assistant Clerk)
06/07/2012		Appearance of Deft's Atty: Sean T Delaney
06/07/2012	52	Statement of Appointment of Sean T Delaney pursuant to SJC Rule 1:07
06/07/2012	52	(Dennis F.Collins, Assistant Clerk)
06/07/2012	53	ORDER ASSESSING STATUTORY FEE FOR APPOINTMENT OF COUNSEL. By the
06/07/2012	53	Court (Dennis F.Collins, Assistant Clerk)
06/07/2012		Legal counsel fee assessed in the amount of \$150.00 (Dennis
06/07/2012		F.Collins, Assistant Clerk)
06/07/2012	54	Habe: returned w/service
06/19/2012	55	Clerks Minutes on Probation Hearing: Hogan, J. presiding; PO Banks;
06/19/2012	55	Defense Counse Delaney; Final Surrender hearing; RESULT: Deft found
06/19/2012	55	in violation. Probation is continued to the original date; Court
06/19/2012	55	reporter Goldberg; M. Toomey/AC
07/09/2012	56	Bail satisfied: \$250.00 Cash Ck. #13145 Surety Kenneth Dykens, 100
07/09/2012	56	Meridian Street, East Boston, Ma 02128
07/16/2012		Bail in the amount of \$250. returned to Surety K Dykens Check #2208
07/23/2012	57	Clerks Minutes Of Probation Hearing: Matt Day, Presiding; Probation
07/23/2012	57	Officer Paul Cashman; Result: Defendant Defaulted Warrant to Issue;
07/23/2012	57	Assistant Clerk Mary Aufiero
07/23/2012		Defendant defaulted; warrant to issue (Probation Warrant)
07/30/2012	58	Petition for review of decision denying release on personal
07/30/2012	58	regognizance or on execution of an unsecured appearance bond (sent to
07/30/2012	58	Paul Cashman,PO)
08/23/2012	59	Clerk's Minutes Of Probation Hearing: Matthew Day, First Asst. Clerk
08/23/2012	59	Magistrate; Probation Officer: Vanessa Banks; Defense Attorney:
08/23/2012	59	Marcia Kovner (apptd); Appointment Of COunsel; Warrant Removed;
08/23/2012	59	Continued to October 25,2012 for Surrender in Rm 530 at 2pm; Result:
08/23/2012	59	Held without bail, without Prejudice. Mitt Issued; Assistant Clerk:
08/23/2012	59	Dennis F.Collins
08/23/2012		Default removed; warrant recalled
08/23/2012	60	Affidavit of indigency filed; APPROVED, Committee for Public Counsel

08/23/2012	60	Services appointed. (Matt Day, First Assistant Clerk))
08/23/2012	61	Statement of Appointment of Marcia T Kovner pursuant to SJC Rule 1:07
08/23/2012	61	(Matthew Day, Esq. 1st Asst. Clerk Magistrate)
08/23/2012	62	Notice of assignment of counsel filed. c50978561 Marcia T.Kovner,Esq.
08/23/2012	62	(Dennis F.Collins, Assistant Clerk)
08/23/2012	63	ORDER Assessing Statutory Fee For Appointment Of Counsel. By The
08/23/2012	63	Court (Dennis F.Collins, Assistant Clerk) Dated: August 23,2012
08/23/2012	64	Mittimus issued
11/26/2012		Letter from defendant to Lauriat,J mailed this day
11/26/2012	65	MOTION by Deft: To Release Defendant From Wrongful Term's Of
11/26/2012	65	Probation; and Affidavit
11/26/2012		MOTION (P#65) Since defendant is represented by counsel with respect
11/26/2012		to his ongoing probation motions
12/17/2012		Letter from defendant re transcripts (sent to 530)
02/15/2013	65	Clerks Minutes On Probation Hearing: (Lauriat,J.) Presiding;
02/15/2013	65	Probation Officer: Kovner; Assistant D.A.: Alyson Brown; Final
02/15/2013	65	Surrender Hearing; Continued to 3/12/13 for Day 2 Of Hearing; Result:
02/15/2013	65	Def. Attorney is Allowed to Withdrsw-Def is Allowed To Proceed
02/15/2013	65	Pro-Se; Assistant Clerk: Mark Toomey
02/22/2013	66	Commonwealth files memorandum in opposition to defendants motion to
02/22/2013	66	terminate/dismiss probation term for violation of the
02/22/2013	66	district/municipal court rules of probation violation procedures
02/22/2013	67	MOTION by Deft: for ineffective assistance of counsel with a
02/22/2013	67	memorandum attached sent to 530
02/22/2013	68	MOTION by Deft: for bail review (sent ot Lauriat,J)
03/06/2013	69	MOTION by Deft: petition for bail review for superior court
03/06/2013	69	2005-393-003 and District Court case 1253cr001791-A-D
03/06/2013	70	MOTION by Deft: supplemental to commonwealths memorandum in
03/06/2013	70	opposition to defendants motion to dismiss or terminate probation
03/06/2013	71	Deft files factual and procedural background
03/06/2013	72	MOTION by Deft: to dismiss
03/06/2013	73	MOTION by Deft: for manditory discovery non-compliance of commonwealth
03/22/2013	74	Clerks Minutes on probation hearing: (Lauriat,J) Presiding Deft
03/22/2013	74	Counsel pro-se ADA Rubin/braur Final surrender hearing Defendant
03/22/2013	74	found in violation of probation on009 Defendant sentenced to 2 years
03/22/2013	74	HOC 241 days jailcredit on 001 defendant sentenced to 2 years HOC
03/22/2013	74	from and after 009 0 days jail credit on 015,016,017 probation is
03/22/2013	74	Terminated
03/22/2013		Reporter present: Goldberg, Erika
03/22/2013	75	MOTION by Deft: to amend
04/11/2013	76	ORDERED: Probation terminated; Deft discharged (Tuttman,J)
10/11/2013	77	MOTION by Deft: To Vacate; and Memorandum Of Law. (COPY MAILED TO

10/11/2013 77 JUDGE LAURIAT @ SUFFOLK SUPERIOR COURT)
05/05/2014 Appearance of Deft's Atty: Timothy St. Lawrence

Charges

17 Charges for Docket: MICR2005-00393

No.	Charge Description:	Indictment:	Status:
1	ATTEMPT TO COMMIT CRIME c274 s6		Guilty plea
2	HABITUAL CRIMINAL		Guilty plea
3	ATTEMPT TO COMMIT CRIME c274 s6		Guilty plea
4	HABITUAL CRIMINAL		Nolle prosequi
5	ATTEMPT TO COMMIT CRIME c274 s6		Guilty plea
6	HABITUAL CRIMINAL		Nolle prosequi
7	ASSAULT TO MAIM c265 s15		Guilty plea
8	HABITUAL CRIMINAL		Nolle prosequi
9	A&B WITH DANGEROUS WEAPON c265 s15A(b)		Guilty plea
10	HABITUAL CRIMINAL		Nolle prosequi
11	BURGLARIOUS INSTRUMENT, POSSESS c266 s49		Guilty plea
12	HABITUAL CRIMINAL		Nolle prosequi
13	DESTRUCTION OF PROPERTY +\$250, MALICIOUS c266 s127		Dismissed
14	HABITUAL CRIMINAL		Dismissed
15	A&B ON PUBLIC EMPLOYEE c265 s13D		Guilty plea
16	A&B ON PUBLIC EMPLOYEE c265 s13D		Guilty plea
17	RESIST ARREST c268 s32B		Guilty plea

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

MIDDLESEX, SS.

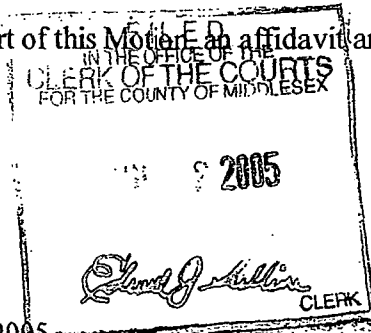
MIDDLESEX SUPERIOR COURT
INDICTMENT # 2005-393

COMMONWEALTH)
)
vs.)
)
KENNETH DYKENS)

MOTION TO DISMISS COUNTS 3-6, 9-10, 13-14 OF THE INDICTMENT

The defendant in the above-captioned seventeen-count indictment, pursuant to the decisions in Commonwealth v. DiBennadetto, 436 Mass. 310, 313-314 (2002), Bradford v. Knights, 427 Mass. 748, 753 (1998), Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982), and Commonwealth v. O'Dell, 392 Mass. 445, 450 (1984), respectfully moves this Honorable Court to dismiss counts 3-6, 9-10 and 13-14 of said indictment for the failure of the Commonwealth to present sufficient evidence to the Grand Jury for issuance of multiple counts of attempts to commit unarmed burglary with companion "habitual criminal" indictments, assault by means of a dangerous weapon (shod foot) with a companion "habitual criminal" indictment, and malicious destruction of property over \$250 with a companion "habitual criminal" indictment.

In support of this Motion, an affidavit and Memorandum of Law is submitted herewith.



Date: May 31, 2005

Respectfully Submitted,
KENNETH DYKENS, Defendant
By His Attorney:

Mark Wester, Esq.
69-71 Main Street
Hudson, MA 01749
978-562-1885
BBO # 546276

CERTIFICATE OF SERVICE

The foregoing Motion, Affidavit and Memorandum of Law in Support, with Notice of Hearing thereon in the Middlesex County Superior Court on Wednesday, June

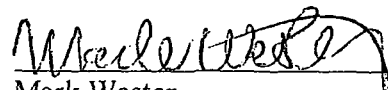
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R. 73

8, 2005 at 2 p.m. in Judge Lauriat's Courtroom 10B Session, was served on the following parties by mailing copies of same, first class mail, postage prepaid this 31st day of May 2005:

Middlesex County District Attorney's Office
Attention: A.D.A. David Marc Solet, Esq.
40 Thorndike Street
Cambridge, MA 02141

Signed under pains and penalties of perjury.


Mark Wester

mtntodismiss_dykens

MIDDLESEX, SS.

MIDDLESEX SUPERIOR COURT
INDICTMENT # 2005-393

COMMONWEALTH)
)
vs.)
)
KENNETH DYKENS)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COUNTS
3-6, 9-10, 13-14 OF THE INDICTMENT

1. Counts 3, 4, 5 and 6.

In its presentation to the Grand Jury, the Commonwealth, in its first letter, alleged that the defendant on February 10, 2005 in Malden attempted to break and enter the dwelling house of John Cram and Jacqui Cram in the nighttime with intent to commit a felony therein¹, "and in such attempt, did position a ladder in order to facilitate entry into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted offense or was intercepted or prevented in the perpetration of said attempted offense." (see Grand Jury Minutes, p.3.)

In its second and third letter of its presentation to the Grand Jury, the Commonwealth alleged that on the same date, place, and time, the defendant attempted to commit unarmed burglary by: removing an outer screen in order to facilitate entry into the home of John Cram and Jacqui Cram, failing in the perpetration of said attempted offense; and attempted to commit unarmed burglary by smashing a glass sliding door in order to facilitate entry into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted offense. (see Grand Jury Minutes, pp. 3-4.)

¹ The Grand Jury did not indict the defendant for attempted breaking and entering in the nighttime with the intent to commit a felony, instead indicting him for three counts of attempted unarmed burglary.

10

R. 75

These three letters became the subject of Count 1, Count 3 and Count 5 of the indictment, alleging attempts by the defendant, in violation of M.G.L. Chapter 274, Section 6, to commit unarmed burglary, in violation of M.G.L. Chapter 266, Section 15, with three corresponding counts under the "habitual criminal" statute, M.G.L. Chapter 279, Section 25 in Counts 2, 4 and 6 of the indictment.

The incident that is the subject of this indictment is an attempted housebreak on February 10, 2005 at approximately 2:30 a.m. at 124 Granite Street, Malden. The Malden Police were dispatched to that address at that time on a report of a housebreak in progress. (*see Grand Jury Minutes, p. 8.*) The Police responded to the scene and spoke with the victims, John and Jacqui Cram. The Crams stated they were asleep on the second floor when John was awoken by a loud noise from downstairs. John went downstairs to investigate and went to the kitchen to look out the sliding glass door that went to a deck at the rear of the house. He noticed that the glass on the door was broken and could see that a ladder he kept at the side of the house had been moved to the deck and was partially propped up towards the house. He then saw a shadow of a person running across the rear of the house. A screen was on the ground outside of the house that had been on the first floor window located just above the cellar bulkhead door. It appeared that the suspect had stood on the bulkhead and attempted to gain entry through this window. (*see Grand Jury Minutes, pp. 11-12.*)

The Commonwealth is alleging that the three overt acts allegedly committed by the defendant of: 1) propping the ladder up against the house; 2) breaking the glass on the sliding glass door; and 3) removing a screen door window, none of which led to the defendant successfully gaining entry to the house, constitute three separate indictable

offenses of attempted unarmed burglary. This is overreaching and overcharging on the part of the Commonwealth, because of all the potential "overt acts" involved in one attempted housebreak that could be construed in this fashion as separate crimes. If the defendant had hopped a chain link fence to get onto the property leading up to the house, had put a pair of gloves on to avoid leaving fingerprints, had disconnected the alarm system to the house to avoid detection, and had parked a getaway car down the street and left the engine running to facilitate his escape, all overt acts linked to the potential housebreak, would or could the Commonwealth be justified in indicting him for seven separate attempted unarmed burglaries instead of three? The Court should see dismiss all but one of the attempt counts and leave one of the corresponding "habitual criminal" counts.

2. Counts 9 and 10.

In Count 9 of the indictment the defendant is charged with assault and battery by means of a dangerous weapon, to wit, a shod foot, in violation of G.L. Chapter 265, Section 15A.

According to the sworn testimony of Malden Police Officer Brian Killion, the defendant, who had fled from the scene of the alleged housebreak, was chased and apprehended in a heavily wooded area by Malden Police Officer Selfridge. The defendant was wrestling with Officer Selfridge in the brush, involved in a violent struggle. A third officer arrived and assisted Killion and Selfridge with securing the defendant. The defendant was handcuffed. As the Police attempted to roll the defendant over and stand him up, he managed to kick Killion in the face. During the incident all officers involved and the defendant "fell numerous times" and were scratched or bruised

by rocks and brush. (see Grand Jury Minutes, pp.14, 16.) There is no grand jury testimony as to the injury or hurt if any to Officer Killion inflicted as a result of the alleged kick to the face. See Commonwealth v. Lord, 55 Mass.App.Ct. 265 (2002). ("Hurt or injury need not be permanent, but must be more than merely transient and trifling.")

3. Counts 13 and 14.

The defendant is charged in Count 13 with malicious destruction of property over \$250, in violation of G.L. Chapter 266, Section 127, the sliding glass door that was smashed as part of the attempted housebreak. (see Grand Jury Minutes, pp. 4, 10-11.) Count 14 is a corresponding "habitual criminal" indictment for the crime alleged in Count 13.

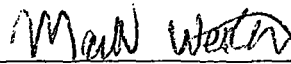
Malicious destruction of property is a specific intent crime. It requires that the actor destroying or injuring the property in question do so with cruelty, hostility or revenge. Commonwealth v. Cimino, 34 Mass.App.Ct. 925 (1993). Wanton destruction of property is not a lesser included offense of malicious destruction of property. Commonwealth v. Schuchardt, 408 Mass. 347 (1990).

If the defendant broke the sliding glass door in an attempt to commit unarmed burglary, as the Commonwealth has alleged in Count 1 of the indictment, then how could he also have broken the sliding glass door maliciously? The answer is, of course, there is no way he could have done so, and Count 13 and 14 should be dismissed.

4. Conclusion.

The defendant respectfully moves that the Court exercise its gatekeeping function for the factfinder in this case and dismiss eight of the seventeen counts of the indictment.

Respectfully Submitted,
KENNETH DYKENS, Defendant
By His Attorney:



Date: May 31, 2005

Mark Wester, Esq.
69-71 Main Street
Hudson, MA 01749
978-562-1885
BBO#546276

MIDDLESEX, SS.

COMMONWEALTH

VS.

KENNETH DYKENS

MIDDLESEX SUPERIOR COURT
CLERK'S OFFICE
INDICTMENT # 2005-393
IN THE COUNTY OF MIDDLESEX

JUN 2 2015

Edward J. Sullivan

CLERK

Mark Wester
Mark Wester

Ct.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT DEPART.
DOCKET NO. 2005-393

COMMONWEALTH

v.

KENNETH DYKENS

7/20/05
RJK

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTIONS TO DISMISS

INTRODUCTION

Now comes the Commonwealth and moves in opposition to Defendant's Motion to Dismiss. As reasons therefore, the Commonwealth asserts that the Grand Jury heard sufficient testimony to find Probable Cause of each criminal violation alleged.

FACTUAL BACKGROUND

Members of the Grand Jury heard evidence of the following facts on March 29, 2005, which have been selected to deal only with the matters disputed by Defendant in his motion of May 31, 2005. On February 10, 2005, officers of the Malden Police were dispatched to 124 Granite St. in Malden on a report of a housebreak in progress. (GJ-p.8). Police arrived at the scene and spoke with the residents of the home, John and Jacqui Cram. The Crams indicated that they had been asleep on the second floor of the home when John Cram was awakened by a loud noise. When he went downstairs to investigate, he saw that a sliding glass door that led to a deck at the rear of the house had

been smashed. (GJ-p.11). A large rock was found among the broken glass. (GJ-Exhibit 2). He also noticed that ladder that had been kept at the side of the house flat on the ground had been moved by an unknown party so that it leaned against the house. (GJ-p.11) He then saw the shadow of an unknown person run across the rear of the house. (GJ-p.11). Later, he noticed a screen that had been on a first-floor window right above the cellar bulkhead door had been torn off. It appeared as if the suspect had stood on the bulkhead and attempted to gain entry through the window. (GJ-p.11-12).

Malden Police followed footprints in the snow to a wooded area nearby. There they encountered the Defendant, Kenneth Dykens, who appeared to be hiding. (GJ-p.24). He told the pursuing officer, Robert Selfridge, "I fucking did it, so shoot me." (GJ-p.24). Dykens then tried to escape, and when Officer Selfridge attempted to take him into custody, he resisted violently, punching the officer in the head and ribs repeatedly and engaging in a furious struggle. (GJ-p.28). Even after other officers overcame Dykens and placed him in handcuffs, Dykens continued to fight, kicking Officer Brian Killion in the face while shod. (GJ-p.30).

A complete copy of the Grand Jury Minutes and exhibits is attached in Appendix I.

ARGUMENT

I. THE EVIDENCE PRESENTED TO THE GRAND JURY SHOWS THREE SEPARATE AND DISTINCT EFFORTS TO GAIN ENTRY TO THE VICTIM'S HOME BY THREE SEPARATE MEANS OF INGRESS, EACH ONE CONSTITUTING AN ATTEMPT TO COMMIT AN ILLEGAL ENTRY INTO A DWELLING.

The Grand Jury heard evidence of three separate and distinct efforts to gain unauthorized entry into the Cram residence. The Grand Jury heard that a ladder, which

belonged to the residents and had been resting on the ground beside the house, had been propped against the house by a party other than the residents (GJ-p.8-9, p.11, GJ-Exhibit 2); that a screen that belonged on the first floor window, located above a cellar bulkhead door, had been torn off (GJ-p.11-12); and that a sliding glass door in the rear of the house had been smashed with a rock (GJ-p.9-10, GJ-Exhibit 2).

It is well-established that conduct of this type is sufficient to establish the crime of Attempted Burglary. See e.g. Commonwealth v. Reynolds, 10 Mass. App. Ct. 830, 831 (1980) (conviction for attempted breaking and entering upheld where jury heard evidence that defendant hurled rock through window in the nighttime, permitting inference of intent to enter and commit larceny). See also Commonwealth v. Graham, 62 Mass. App. Ct. 642, 645 (2004) (“The evidence of the defendant's attempt to gain entry to the building in the middle of the night by ringing buzzers, his subsequent lurking on a fire escape outside of an apartment, and his pulling on a window grate was sufficient to establish the first two elements of the offense: that the defendant harbored the intent to break and enter the building at 363 Marlborough Street, in the nighttime.”).

Defendant claims, without citing any legal authority, that the court should somehow dismiss two of the three indictments alleging Attempt. Defendant ignores the fact that the three charges allege not constituent of the same act (“hopping a fence . . . putting on gloves . . . parking a getaway car . . .” see Brief of Defendant at 3), but three separate and *distinct* attempts to enter, made through three different would-be points of entry. The first, the positioning of the ladder, reflects an effort to enter through a second-story window. That effort proved unsuccessful. The second, removing the screen over the bulkhead, was an effort to enter through a different, first-story window. That too

proved unsuccessful. Finally, the use of the rock to smash the glass doors was successful, but the entry was aborted, and thus the burglary was left incomplete.

By analogy, if a would-be assassin were to make three separate attempts on the life of a target – by firing a rifle (that missed), by slipping poison into a bowl of soup (that the target never ate), and by rigging a bomb to a car (that the target never entered) – it would be plain that three separate charges of Attempt were appropriate, even if the attempts all had a single common purpose – to kill the target. The essential nature of the narrative in the instant case is of attempt and failure, attempt and failure, attempt and failure. Each charge has a separate and distinct nature, a separate overt act, and each was frustrated prior to the commission of the next.

To sustain a conviction for criminal attempt, the Commonwealth must prove: (1) a specific intent to commit the substantive offense; and (2) an overt act towards its commission, which overt act “must approach the achievement of the substantive crime attempted near enough to warrant criminal liability.” Commonwealth v. Gosselin, 365 Mass. 116, 121 (1974). See Commonwealth v. Foley, 24 Mass. App. Ct. 114, 115 (1987). Because the alleged overt acts are separate and distinct, and because they were made with the intent to make different entries, three distinct charges are appropriate. See also Commonwealth v. Clemente, 25 Mass. App. Ct. 229, 235 (1988) (upholding multiple convictions for breaking and entering even where the breaks were part of a common criminal scheme).

What bearing the similarity of the three attempts should have on sentencing is of course an issue to be reached at that phase of the trial process, if the Defendant is found guilty, and not before.

II. THE GRAND JURY HEARD SUFFICIENT EVIDENCE TO CONCLUDE THAT THE DEFENDANT COMMITTED AN ASSAULT AND BATTERY BY MEANS OF A DANGEROUS WEAPON.

Defendant also asks that the indictments alleging Assault and Battery by Means of a Dangerous Weapon be vacated, apparently on the basis that there was insufficient evidence of actual harm presented to the Grand Jury. (Brief of Defendant, p.4). He offers without citation for this proposition a section of a footnote, see Brief of Defendant at 4, from Commonwealth v. Lord, 55 Mass. App. Ct. 265, fn.7 (2002), but apparently mistakes the meaning of the language contained therein. As Lord makes clear, to qualify as a dangerous weapon, an item must be “*capable of causing death or the requisite degree of bodily harm.*” Lord at 269 [italics added]. There is no requirement of *actual* serious injury inflicted to sustain a conviction of ABDW – that would convert the standard of proof required for a simple ABDW under G.L. c.265 §15A(b) into that required to show ABDW-Serious Bodily Injury under G.L. c.265 §15A(c)(i). Thus, it does not avail the Defendant that the officer may not have suffered lasting or disabling injuries as a result of being kicked in the face with a shod foot. The issue is merely whether a shod foot is capable of inflicting such injuries – and both common sense and the case law has repeatedly held that a shod foot may be. See e.g. Commonwealth v. Mills, 54 Mass. App. Ct. 552, 555 (2002) (“Indeed, whether a particular piece of footwear is a “dangerous weapon” frequently presents a factual question for the jury’s consideration and thus requires an instruction on lesser offenses”). Certainly it cannot be stated as a matter of law that a Grand Jury that hears testimony that someone is kicked in the face with a shod

foot may not find probable cause that an Assault and Battery by Means of a Dangerous Weapon has taken place.

III. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE GRAND JURY TO CONCLUDE THAT THE DEFENDANT COMMITTED A MALICIOUS DESTRUCTION OF PROPERTY OVER \$250.

Defendant claims that there is some logical inconsistency between the indictment alleging that the smashing of the window was an overt act constituting Attempted Unarmed Burglary and the indictment that alleges that the smashing of the window constituted Malicious Destruction of Property.

Willful and malicious property destruction is a specific intent crime requiring proof that the defendant intended both the conduct and its harmful consequences, while wanton property destruction requires only a showing that the actor's conduct was indifferent to, or in disregard of, the probable consequences. Commonwealth v. Armand, 411 Mass. 167, 170-171, 580 N.E.2d 1019, 1022 (1991). The essence of the distinction "appears to lie in the fact that a willful actor intends both his conduct and the resulting harm, whereas a wanton or reckless actor intends his conduct but not necessarily the resulting harm." Commonwealth v. Smith, 17 Mass. App. Ct. 918, 920, 456 N.E.2d 760, 763 (1983). As an example, if youths throw rocks from a bridge and one strikes a car passing below, the act is wanton if the rocks were thrown casually, without thought of striking any cars, but the act is willful and malicious if the rocks were aimed at passing cars. Commonwealth v. Cimino, 34 Mass. App. Ct. 925, 927, 611 N.E.2d 738, 740-741 (1993). In the instant case, where the rock was plainly selected as an instrument well-

suiting for the smashing of a plate glass door, the intent to achieve the destruction of the glass – and not merely the reckless hurling of a boulder – is clear.

As for the requirement of hostility, it is self-evident that the act of causing irreparable damage to the dwelling of a stranger, in order to enter their home in the nighttime and commit a felony therein, is an act of naked and overt hostility, one that is entirely different in character from the reckless or wanton destructive behavior that might characterize the actions of someone clumsy, distracted or drunk. The sustained and repeated efforts of the Defendant in the instant case also reflect a driven quality that further underlines the nature as being substantially more focused and motivated than mere wanton conduct.

In addition, the recognition that the intentional destruction of property in order to gain access to the interior of a building may be deemed Malicious Destruction of Property is also well-established in the case law. See e.g. Commonwealth v. Ford, 20 Mass. App. Ct. 575 (1985) (Defendant convicted of malicious destruction of property for *smashing glass window during act of breaking and entering a store to commit larceny*), reversed on unrelated grounds by Commonwealth v. Ford, 397 Mass. 298 (1986).

Defendant does not appear to challenge the sufficiency of testimony as to the value of the destroyed property. (GJ-p.11).

CONCLUSION

Based on all of the above, the Grand Jury was warranted in finding probable cause that the Defendant committed the charged offenses. For that reason the Commonwealth asks that the Defendant's Motion to Dismiss be denied.

Respectfully Submitted
For the Commonwealth,

MARTHA COAKLEY
DISTRICT ATTORNEY

By: _____



David Marc Solet
Assistant District Attorney
40 Thorndike Street
Cambridge, MA 02141
Tel: (617) 679-6568

Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

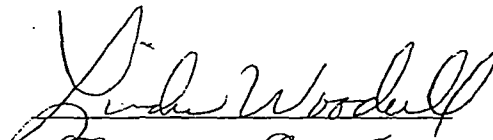
THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of
Middlesex aforesaid, did attempt to break and enter the dwelling house of John Cram and Jacqui Cram in the
nighttime with intent to commit a felony therein, and in such attempt did smash a glass sliding door in order to
facilitate entry into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted
offense, or was intercepted, or prevented in the perpetration of the said attempted offense.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.


Foreperson of the Grand Jury.


Assistant District Attorney.

Superior Court

March Sitting, 2005

12th day - Returned by the Grand Jury and filed in Court.

ORIGINAL


Assistant Clerk

EXHIBIT I

R, 89

Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

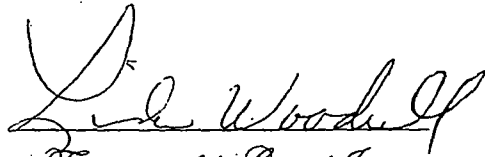
THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,


That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of
Middlesex aforesaid, did attempt to break and enter the dwelling house of John Cram and Jacqui Cram in the
nighttime with intent to commit a felony, and in such attempt did remove an outer screen in order to facilitate entry
into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted offense, or was
intercepted, or prevented in the perpetration of the said attempted offense.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.


Foreperson of the Grand Jury.


Assistant District Attorney.

Superior Court

March Sitting, 2005

12th day - Returned by the Grand Jury and filed in Court.

ORIGINAL


Assistant Clerk

R. 90

Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of
Middlesex aforesaid, did attempt to break and enter the dwelling house of John Cram and Jacqui Cram in the
nighttime with intent to commit a felony therein, and in such attempt did position a ladder in order to facilitate entry
into the home of John Cram and Jacqui Cram, but did fail in the perpetration of said attempted offense, or was
intercepted, or prevented in the perpetration of the said attempted offense.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Leah Woodall
Foreperson of the Grand Jury.

MS
Assistant District Attorney.

Superior Court

March Sitting, 2005

12th day - Returned by the Grand Jury and filed in Court.

David Givens
Assistant Clerk

R.91

ORIGINAL

10
Commonwealth of Massachusetts

Middlesex, To Wit:

At the SUPERIOR COURT, begun and holden at the CITY OF CAMBRIDGE, within
and for the County of Middlesex, on the First Monday of March in the year of our Lord two thousand and five.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present,

That KENNETH DYKENS

on or about the Tenth day of February in the year of our Lord two thousand and five at Malden, in the County of
Middlesex aforesaid, did knowingly have in his possession certain machines, tools or implements, to wit: a heavy rock,
adapted and designed for cutting through, forcing or breaking open buildings, rooms, vaults, safes or other
depositories, in order to steal therefrom such money and other property as might be found therein or to commit any
other crime said KENNETH DYKENS knowing said machines, tools or implements to be adapted and designed for
the purpose aforesaid, and intending to use or employ them therefor.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Rich Woodell
Foreperson of the Grand Jury.

MSJ
Assistant District Attorney.

Superior Court

March Sitting, 2005

12th day - Returned by the Grand Jury and filed in Court.

David A. Senechal
Assistant Clerk

ORIGINAL

R.92

Commonwealth of Massachusetts

Middlesex ss.

Superior Court
Criminal Indictment
Number 05-393

Commonwealth

VS

KENNETH DYKENS Defendant

Clerks Minutes on Probation Hearing

LAVINIA J. Presiding

Probation Officer BANKS

Defense Counsel ~~PRO~~ PRO-JK

Assistant DA. RUDIN / BRAW

- () Appointment of Counsel
- () Bail Hearing Bail set at \$ _____
- () Preliminary Hearing
- () Status Hearing
- () Warrant Removed*
- () Warrant Removal Fee Imposed \$ _____ / Waived
- () Request for Modification of Conditions
- ☒ Final Surrender Hearing

() Continued to _____ for _____

Result: DEF FOUND IN VIOLATION OF PROBATION.

ON 009 DEF SENTENCED TO 2 YRS HDC 241 DAYS JAILCREDIT

ON 011 DEF SENTENCED TO 2 YRS HDC. FROM & AFTER

009 0 DAYS JAIL CREDIT.

Date: 3-22-13

ON 015, 016, 017 PROBATION IS

Court Reporter GOLDENB

TERMINATED

Assistant Clerk 

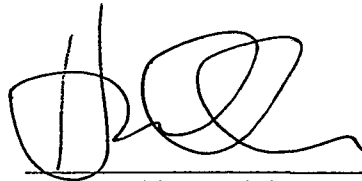
Note: If a warrant is removed call the Clerks Office to have the warrant removed from WMS

R. 93

CERTIFICATE OF SERVICE

I certify that, on the below date, I served a copy of the "Commonwealth's Opposition to Defendant's 'Motion to Vacate'" on the defendant by causing a copy to be placed in our office depository for mailing, first class mail, postage prepaid, to:

Timothy St. Lawrence, Esq.
11 S. Angell St. #252
Providence, RI 02906

A handwritten signature in black ink, appearing to read 'H. White Speight', written over a horizontal line.

Hallie White Speight
Assistant District Attorney

Date: August 18, 2014

**Commonwealth of Massachusetts
County of Middlesex
The Superior Court**

CRIMINAL DOCKET# MICR2005-00393

RE: Commonwealth v Dykens, Kenneth

TO: Timothy St. Lawrence, Esquire
11 South Angell Street
#252
Providence, RI 02906

CLERK'S NOTICE

This is to notify you that in the above referenced case the Court's action on 09/02/2014 is as follows:

MOTION by Deft: to vacate

**MOTION (P#79) Upon review and for the reasons set forth in the commonwealths opposition memorandum, this motion to vacate is denied (Lauriat, Justice).
Copies mailed**

Dated at Woburn, Massachusetts this 9th day of September, 2014.

Michael A. Sullivan,
Clerk of the Courts

Location: 2nd Criminal -Ct Rm 530 Woburn

R. 95

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX COUNTY

SUPERIOR COURT
NO. 2005-00393

COMMONWEALTH

V.

KENNETH DYKENS

NOTICE OF APPEAL

The defendant hereby gives notice, pursuant to Rule 3 of the Massachusetts Rules of Appellate Procedure, of his intent to appeal the denial of his Massachusetts Rule of Criminal Procedure 30(a) "Motion to Vacate," which motion was denied on September 2, 2014.

Respectfully submitted,
KENNETH DYKENS
By his attorney

Tim StLawrence

Timothy St. Lawrence
BBO #676899
11 S Angell St #252
Providence RI 02906
508 431 3005
tstlawrence@gmail

Dated: September 22, 2014

CERTIFICATE OF SERVICE

I, Timothy St. Lawrence, counsel for the defendant herein, hereby certify that I served a copy of the foregoing "Notice of Appeal" by mail, first-class postage prepaid, on September 22, 2014, to Hallie White Speight, Assistant District Attorney for Middlesex County, 15 Commonwealth Avenue, Woburn, MA 01801.

Tim St Lawrence

Timothy St. Lawrence
BBO #676899
11 S. Angell St., #252
Providence, RI 02906
508.431.3005
tstlawrence@gmail.com

Certificate of Compliance

I certify that this brief complies with the relevant rules of court pertaining to the preparation and filing of briefs. Those rules include Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record; Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations; Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (forms of briefs, appendices, and other papers).

Tim StLawrence

Timothy St. Lawrence